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NORTH DAKOTA SUPREME COURT REVIEW

The North Dakota Supreme Court Review briefly summarizes important decisions rendered by the North Dakota Supreme Court. The purpose of the Review is to indicate cases of first impression, cases of significantly affected earlier interpretations of North Dakota law, and other potential cases of interest. As a special project, the Associate Editors wrote the Review for the *North Dakota Law Review*. The following topics are included in the Review:

ADMINISTRATIVE LAW—JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS—REVIEW OF PARTICULAR QUESTIONS

HUFF V. NORTH DAKOTA STATE BOARD OF MEDICAL EXAMINERS-INVESTIGATIVE PANEL B

The North Dakota State Board of Medical Examiners—Investigative Panel B (Board) issued a complaint against John D. Huff, M.D., in response to the administration of an Ishihara test (I-test) to a patient, Shawn Anderson, first by a nurse and then by Huff.[1] An I-test is a method for evaluating "color vision deficiency that utilizes a series of pseudioso-chromatic plates on which numbers or letters are printed in dots of primary colors surrounded by dots of other colors; the figures are discernible by individuals with normal color vision."[2] The Board complaint alleged that Huff "engaged in the performance of dishonorable, unethical, or unprofessional conduct likely to deceive, defraud or harm the public within the meaning of N.D.C.C. § 43-17-31(6), and/or Respondent engaged in gross negligence in the practice of medicine within the meaning of N.D.C.C. § 43-17-31(15) . . . ."[3] The complaint asserted that after Anderson failed the first I-test, Huff re-administered the test and manually aided Anderson by guiding Anderson's hand in tracing the symbols or numbers on the plates.[4] Huff admitted that he aided Anderson in the tracing of the symbol on the first plate, but argued that appropriate protocol permitted the person giving the exam to instruct the patient on using his or her finger to trace the pattern on the plate as an aid in determining what symbol appeared on the plate.[5] At his hearing, Huff agreed that if the evidence showed that he had aided Anderson in determining the symbol present on every plate presented in the test, such conduct would have been "inappropriate, unprofessional, and gross negligence."[6] The Administrative Law Judge (ALJ), based on

1. Huff v. N.D. State Bd. of Med. Examiners-Investigative Panel B, 2004 ND 225, ¶ 2, 690 N.W.2d 221, 222.
2. *Id.* (citing PDR MEDICAL DICTIONARY at 1804 (2d ed. 2000)).
3. *Id.*
4. *Id.*
5. *Id.* ¶ 3, 690 N.W.2d at 223.
6. *Id.* at 224.

testimony presented by Anderson and a certified opthamolic assistant who witnessed Huff's examination of Anderson, concluded that Huff violated the provisions of North Dakota Century Code section 43-17-31 when he administered his exam of Anderson.[7] The ALJ cited Huff's conduct in crossing out the results of Anderson's original exam conducted by the nurse, and his inflated evaluation of the capability with which Anderson identified the symbols on the different plates as inappropriate, dishonorable, unprofessional, unethical, and likely to defraud, deceive, or harm the public.[8] The ALJ's recommendation that Huff's license be suspended was adopted by the Board, and Huff's license was suspended for one year.[9] The district court subsequently affirmed the Board's order and Huff appealed.[10]

The issue before the court was "whether or not expert testimony was necessary about the required standard of care and whether or not Huff deviated from that standard."[11] The court clarified that when a case is on appeal from an administrative agency decision, it will not substitute its judgment for the judgment of the agency, nor will it make independent findings.[12] Additionally, the court explained that an agency's decisions regarding questions of law are fully reviewable.[13] Huff's argument asserted that when the license of a professional is at stake, the testimony of an expert regarding the applicable standard of professional conduct is required when considering the issue of whether that standard of conduct was met.[14] The court first explained that differences existed between physician disciplinary proceedings and medical malpractice actions.[15] In contrast, an attorney disciplinary proceeding primarily deals with minimum levels of conduct and most often, "the rules themselves" establish "the standard of conduct," whereas an action for malpractice focuses on the reasonableness of an attorney's conduct under certain circumstances.[16] However, the court distinguished, under North Dakota Century Code section 43-17-31,

7. *Id.* ¶ 4, 690 N.W.2d at 225.
8. *Id.*
9. *Id.*
10. *Id.* ¶ 6.
11. *Id.*
12. *Id.* ¶ 8, 690 N.W.2d at 226 (citing Aamodt v. N.D. Dep't of Transp., 2004 ND 134, ¶ 12, 682 N.W.2d 308, 312-13).
13. *Id.* (citing Linser v. Office of Att'y. Gen., 2003 ND 195 ¶ 6, 672 N.W.2d 643, 645-46).
14. *Id.* ¶ 9.
15. *Id.*
16. *Id.* (citing *In re* Disciplinary Action Against McKechnie, 2003 ND 22, ¶ 16, 656 N.W.2d 661, 666).

"physician disciplinary proceedings can be based on both types of conduct."[17]

In beginning its analysis, the court asserted that a majority of jurisdictions that had addressed this issue held that expert testimony was required when the license of a physician was at stake, because it protected the fairness of the proceedings, the administrative record's integrity, and the party's right to a "meaningful judicial review of administrative decisions."[18] The court cited four reasons for the requirement of expert testimony in these types of cases: (1) individuals with their licenses at stake in such a proceeding have "the right to confront, cross-examine, and rebut the evidence against them"; (2) the fact finding of an administrative agency must be constrained to the "evidence properly included in the administrative record"; and (3) many administrative boards and agencies are no longer comprised solely of persons with expertise in the field being regulated, and expert testimony is, therefore, necessary to aid those board members who lack such expertise to conduct their adjudicatory responsibilities; and, (4) allowing for the substitution of board members' expert opinions in lieu of "necessary expert testimony" inhibits the "ability of a reviewing court to determine whether the decision of an agency was based upon substantial and material evidence."[19]

The Board cited three instances in which other courts articulated against necessitating expert testimony.[20] The first instance cited by the Board was a holding that experts were only necessitated if the legislature required them.[21] The second instance cited by the Board was a holding that expert testimony was not required if a "majority of the Board and its investigative members were licensed [dentists] familiar with the standard of care required."[22] The third instance cited by the Board was a holding that expert testimony was only required if the Board was not composed of a majority of experts.[23] Finally, the Board also maintained that expert testimony, even if ordinarily required, was not needed in this case because "the conduct was so egregious[,] expert testimony was unnecessary . . . ."[24] Taking these factors into consideration, the court relied upon decisions

17. *Id.*

18. *Id.* ¶ 10, 690 N.W.2d at 227 (citing Martin v. Sizemore, 78 S.W.3d 249, 271 n.12 (Tenn. Ct. App. 2001)).

19. *Id.* (quoting *Martin*, 78 S.W.3d at 271).

20. *Id.* ¶ 11.

21. *Id.* (citing Ferguson v. Hamrick, 388 So. 2d 981, 983 (Ala. 1980)).

22. *Id.* (citing Croft v. Ariz. State Bd. of Dental Exam'rs., 755 P.2d 1191, 1198 (Ariz. Ct. App. 1988)).

23. *Id.* (citing Jutkowitz v. Dep't of Health Servs., 596 A.2d 374, 387-88 (Conn. 1991)).

24. *Id.*

reached by the Supreme Judicial Court of Maine and the Tennessee Court of Appeals holding that where an act is improper or blatantly illegal, or where a licensee has admitted to a violation, a disciplinary board is not required to provide expert evidence in order to establish the necessary standard.[25] However, in certain instances an administrative review board may be comprised of some members who are not medical professionals, and some who may be medical professionals but are not necessarily experts in the field of medicine practiced by the physician before the board.[26] In such instances, the court stated that requiring expert testimony would be the best means of protecting "the fairness of the contested case proceedings, the integrity of the administrative record, and the right to meaningful judicial review.[27] In the case at bar, Huff asserted that had he given the test to Anderson in the manner described by Anderson and the observing assistant, such actions would indeed have been in violation of the applicable standards established in the N.D.C.C.[28] The court affirmed the license suspension by the Board.[29] The court reasoned that since the Board determined that the evidence presented by Anderson and the technician who observed Huff's administration of the test was the most credible, Huff's actions were indeed in violation of the applicable standards established in the N.D.C.C.[30]

Chief Justice VandeWalle concurred with the result of the majority "[t]o the extent [the] case turn[ed] on the credibility of witnesses before the Board."[31] In concurring specially with the opinion, Chief Justice VandeWalle took issue with the "scant evidence of professional misconduct the attorney for the Board was able to wring from Huff's own lips."[32] The Chief Justice admitted that although there was no error committed on behalf of the ALJ or the Board in relying upon the testimony of Huff, "there is surely a certain irony in so doing, particularly when his [own] credibility on other matters [wa]s rejected by the ALJ and by the Board."[33]

25. *Id.* ¶ 12, 690 N.W.2d at 228.
26. *Id.*
27. *Id.*, (quoting Martin v. Sizemore, 78 S.W.3d 249, 271 (Tenn. Ct. App. 2001)).
28. *Id.* ¶ 14.
29. *Id.*
30. *Id.*
31. *Id.* ¶ 20, 690 N.W.2d at 229.
32. *Id.*
33. *Id.*

ADMINISTRATIVE LAW—SOCIAL SECURITY BENEFITS—ELIGIBILITY
SUTHERLAND V. NORTH DAKOTA DEPARTMENT OF HUMAN SERVICES

In *Sutherland v. North Dakota Department of Human Services*,[34] Marian Sutherland appealed the district court judgment "affirming a Department of Human Services decision that she was not disabled for purpose[s] of receiving Medicaid benefits."[35] The North Dakota Supreme Court reversed the district court decision and determined that evaluating eligibility for Medicaid disability payments must be evaluated using the five-step process as determined by the Social Security Administration.[36]

In June of 2002, Marian Sutherland applied to McKenzie County Social Services for Medicaid benefits, claiming she was disabled.[37] Sutherland described her condition as including degenerative arthritis, degenerative joint disease, destruction of knee joints, osteoarthritis in her right knee, degenerative disc disease, lumbosacral arthritis, peripheral neuropathy, bilateral food deformities, macrocytic anemia, and spondyloarthropathy.[38] Her eligibility report indicated that she had problems walking and sitting for long periods of time, that she had to use crutches because of her deformed feet and back, and that she suffered from constant pain.[39] The State Review Team concluded that Sutherland's medical condition was not sufficient to establish benefits, and therefore the McKenzie County Social Services denied her application for Medicaid benefits for failure to meet the "Social Security disability criteria."[40] Sutherland then appealed to the Department of Human Services.[41] "An administrative law judge recommended that Sutherland be found disabled for purposes of" benefits eligibility.[42] However the Department found that it was not bound to follow the same procedures as the Social Security Administration in determining eligibility for Medicaid under C.F.R. § 435.541.[43]

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34. 2004 ND 212, 689 N.W.2d 880.

35. *Sutherland*, ¶ 1, 689 N.W.2d at 880.

36. *Id.*

37. *Id.* ¶ 2, 689 N.W.2d at 881. This application came after the Social Security Administration had denied her Supplemental Security Income and Social Security Disability Insurance. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* ¶ 3.

41. *Id.* ¶ 4.

42. *Id.*

43. *Id.* ¶¶ 4-5. According to the Department, Sutherland failed to show that she had met the Social Security Administration's definition of disability because she had "failed to prove that she ha[d] a severe impairment, which makes her unable to do her previous work, or any other

In a case such as this, the court is entitled to review the decision of the administrative agency.[44] An agency's decision will be affirmed if a reasonable mind could have arrived at that decision based on the weight of the evidence of the entire record.[45] Sutherland argued that North Dakota law bound the Department to follow the Social Security Administration's standards.[46] She further asserted that she would have qualified if such Social Security Administration standards were followed.[47]

The Social Security Administration, via its implementing act, defines disability as the "'inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.'"[48] The first step in the five-step Social Security Administration disability evaluation standard determines whether the claimant "is engaged in 'substantial gainful activity.'[49] If the individual is not engaged in "substantial gainful activity," the next step is to determine whether the claimant suffers from a "severe impairment or a combination of impairments."[50] If the impairment is considered severe, the next step is to determine if the impairment is equal to one of the listed impairments that the Secretary acknowledges as so severe that it precludes "substantial gainful activity."[51] If the impairment is considered equivalent, the claimant is deemed to be disabled.[52] If not, the fourth step requires a determination of whether the claimant can perform the type of work he or she has done in the past.[53] If the impairment is not considered equivalent, the last step is to consider whether the claimant is able to perform other work in consideration of his or her age, education, and work experience.[54]

The Department failed to cite any authority supporting its claim that it need not follow the five-step process, and since North Dakota law incorporates the federal definition of disability, the court held that the

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substantial gainful activity which exists in the national economy." *Id.* ¶ 5. The Department instead found that the evidence was sufficient to show that Sutherland was "capable of light sedentary work." *Id.* at 882.

44. *Id.* ¶ 6.
45. *Id.*
46. *Id.* ¶ 7.
47. *Id.*
48. *Id.* ¶ 9, 689 N.W.2d at 883 (quoting 42 U.S.C. § 423(d)(1)(A) (2000)).
49. *Id.* ¶ 10, 689 N.W.2d at 883 (citing Bowen v. Yuchert, 482 U.S. 137 (1987)).
50. *Id.*
51. *Id.*
52. *Id.* at 883-84.
53. *Id.* at 884.
54. *Id.*

Department was bound to follow the five-step process for determining disability.[55]

The Department further argued that despite its failure to follow the procedure, its decision was consistent with the procedure.[56] The court highlighted that the severity requirement involved only minimal effects on the claimant's work activities; therefore, the court found that the Department's failure to follow the five-step procedure affected not only its evaluation, but also the court's evaluation on appeal.[57] Thus, the court remanded the case to the Department with the instructions that the claim be reviewed under the five-step procedure as provided by the Social Security Administration.[58]

CIVIL PROCEDURE—CHOICE OF LAW—AUTOMOBILE INSURANCE

NODAK MUTUAL INSURANCE CO. v. WAMSLEY

In *Nodak Mutual Insurance Co. v. Wamsley*,[59] the defendants appealed a declaratory judgment entered by the district court in favor of the plaintiff, Nodak Mutual Insurance Company (Nodak), to determine the obligations of Nodak under an insurance policy.[60] The insurance dispute arose out of a fatal collision involving the parents (Wamsleys) of the defendants, who were killed when another vehicle struck their car in Montana.[61] As a result of the three vehicle insurance policies that provided uninsured motorist coverage (UIM) of $100,000 per person, per accident, Nodak paid $200,000 to the Wamsley estate.[62]

Nodak brought a declaratory action in North Dakota against the Wamsley heirs, and alleged that the UIM did not apply to the accident and could not be stacked.[63] The Wamsley heirs filed a motion to dismiss Nodak's claim due to "forum non conveniens and for failure to state a claim

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55. *Id.* ¶ 11, 689 N.W.2d at 884. 42 C.F.R. § 435.541(d)(2) provides that the Department must "make a determination of disability . . . [i]n accordance with the requirements for evaluating that evidence under the SSI program specified in 20 CFR 416.901 [sic] through 416.998 [sic]." *Id.*

56. *Id.* ¶ 12.

57. *Id.*

58. *Id.* ¶ 13.

59. 2004 ND 174, 687 N.W.2d 226.

60. *Wamsley*, ¶ 1, 687 N.W.2d at 228.

61. *Id.* ¶ 2. The parents of the defendants were Alan and Sharon Wamsley. *Id.* The insurer of the other car's driver paid the Wamsley estate the policy limit of $25,000 per person. *Id.*; *see id.*, ¶ 1 (explaining that the defendants included Corey Wamsley, Jeff Wamsley, Joe Wamsley, Craig Wamsley, Kimberly Kinev, and Jamie Pfau (hereinafter "Wamsley Heirs")).

62. *Id.* ¶ 3.

63. *Id.* ¶ 4.

upon which relief may be granted."[64] The Wamsley heirs pleaded that the Montana Supreme Court allowed stacking, and argued that Montana law should apply.[65] In response, Nodak argued that North Dakota law should apply, where policies and provisions prohibit stacking.[66] The trial court denied the Wamsley heirs' request for dismissal, and stated that North Dakota had more significant contacts and an interest in the issue.[67] The trial court granted Nodak's summary judgment motion, as the court had already determined that North Dakota law applied.[68] Judgment was entered and the Wamsley heirs conceded that Nodak was not obligated to stack UIM coverages, and that the maximum amount of UIM coverage had already been paid by Nodak under the policy.[69] On appeal, the Wamsley heirs again contended that Montana law should apply to the litigation.[70]

The North Dakota Supreme Court first analyzed whether the appeal was premature under North Dakota Century Code section 32-23-06.[71] This section states that in actions brought by an insurance company to determine liability to the insured, the court shall enter a declaratory judgment, even though liability has not been determined.[72] The section further provides that the court has the discretion to grant or deny a request for declaratory judgment, and its decision will not be overturned unless there has been an abuse of discretion.[73] However, the *Wamsley* court stated that this statute was inapplicable because Nodak was not trying to determine its responsibility to defend or questioning coverage.[74] The court concluded the trial court did not abuse its discretion.[75]

The court then examined the choice-of-law issue—whether North Dakota law or Montana law governed coverage under the insurance policies.[76] The court stated the determination of which state law to apply would be based on the disputed issue; in this case, the court determined that the disputed issue was the availability of stacking and that it was a contract

64. *Id.* ¶ 5.
65. *Id.* at 228-29.
66. *Id.* at 229.
67. *Id.*
68. *Id.* ¶ 6.
69. *Id.*
70. *Id.*
71. *Id.* ¶ 7.
72. *Id.*
73. *Id.* (citing Blackburn, Nickels & Smith, Inc. v. Nat'l Farmers Union Prop. & Cass. Co., 452 N.W.2d 319, 322 (N.D. 1990)).
74. *Id.*
75. *Id.*
76. *Id.* ¶ 9, 687 N.W.2d at 230.

issue.[77] Under contract choice-of-law, the court applied the significant contacts test using a two-prong analysis.[78] The two-prong test required the court to identify the applicable contacts in each respective state and then to apply *Leflar*'s choice-influencing considerations to determine which jurisdiction had the most significant interest in the issue.[79]

The first part of the court's *Leflar* analysis explained predictability of results.[80] The court noted the importance of predictability of results in allowing parties to a contract to know and be aware of what law would settle a potential dispute.[81] The court then noted that in insurance contracts, parties are more likely to believe that the state's law where the policy was issued, negotiated, paid for, and applied for would govern lawsuits involving the insurance contract.[82]

The court's next few steps in the *Leflar* analysis included the following considerations: 1) maintenance of interstate and international order; 2) simplification of judicial task; and 3) advancement of the forum's interests.[83] The court determined that maintenance of interstate and international order did not require an application of Montana law to avoid friction and facilitate commerce.[84] It also found that neither law was favored by a simplification of judicial tasks, as it was determined irrelevant because either state's law could be applied in the case without difficulty.[85] On the question of advancement of governmental interests, the court concluded that North Dakota prevailed due to its articulated interest in UIM by mandating coverage and limiting stacking.[86] Finally the court looked at the last step in *Leflar*'s analysis, application of a better rule of law.[87] The court did not

77. *Id.* ¶ 10, 687 N.W.2d at 230-31.

78. *Id.* ¶ 13, 687 N.W.2d at 231 (citing Daley v. Am. States Preferred Ins. Co., 1998 ND 225, ¶ 10, 587 N.W.2d 159, 161).

79. *Id.* The Montana contacts included situs of the accident, two parties involved in the collision were from the state as well as the witnesses, authorities from the state responded to the accident, medical bills were incurred there, a blood alcohol content test was performed there, and a tort action was initiated in the state. *Id.* ¶ 14, 687 N.W.2d at 231-32. The North Dakota contacts included; the Wamsleys were from North Dakota, Nodak was a North Dakota company and did not issue policies in Montana, the Nodak policies at issue covered North Dakota vehicles and were issued in North Dakota, the Wamsleys contracted for and initiated the policies in North Dakota, the Wamsleys also paid their premiums in the state, the forms used by Nodak were approved by North Dakota, four of the Wamsley heirs live in North Dakota, and the co-personal representatives of the estate were from North Dakota. *Id.* ¶ 15, 687 N.W.2d at 232.

80. *Id.* ¶ 16.

81. *Id.* ¶ 17.

82. *Id.* ¶ 19, 687 N.W.2d at 233.

83. *Id.* ¶¶ 20, 21, 687 N.W.2d at 233-34.

84. *Id.* ¶ 20.

85. *Id.* ¶ 21.

86. *Id.* at 234.

87. *Id.* ¶ 22.

come to a conclusion on this matter, as it did not need to be decided because the Wamsley heirs stated this factor should not influence the decision.[88] The court ultimately determined that North Dakota had the most significant contacts and interest in regard to the insurance contract issue.[89]

Justice Maring dissented, finding that the declaratory action was premature and that *Leflar*'s factors had not been appropriately applied.[90] The declaratory action was premature due to the unresolved factual issue of a damages amount from the tort action which triggered UIM, and because it encouraged piecemeal litigation.[91] Additionally, Justice Maring contended the factors were inappropriately applied as the majority relied too heavily on the *lex loci* doctrine, or the territorial approach, which was inconsistent with North Dakota case law.[92] The majority relied on the location in which the insurance contract was created, and Justice Maring's dissent contended it should not have been the deciding factor, as there were other relevant interests in Montana that were not sufficiently considered.[93] Further, according to Justice Maring, the majority failed to apply the significant contacts test and *Leflar* choice-of-law factors appropriately by failing to give all the considerations proper weight.[94]

88. *Id.* at 234-35.

89. *Id.* ¶ 23, 687 N.W.2d at 235.

90. *Id.* ¶ 27 (Maring, J., dissenting).

91. *Id.* ¶¶ 29-30.

92. *Id.* ¶ 32, 687 N.W.2d at 236.

93. *Id.* ¶ 36, 687 N.W.2d at 236-37. The Montana interests not considered included the nature of insurance contracts, medical bills issued there, and the public policy of Montana to financially protect individuals injured between its borders. *Id.* ¶ 37.

94. *Id.*

COURTS—NATURE, EXTENT, AND EXERCISE OF JURISDICTION—JURISDICTION OF THE PERSON

BOLINSKE V. HERD

In September 1998, Robert Bolinske contacted a lawyer, Thomas Herd, at the law firm of Gaddis, Kin & Herd, P.C. (Gaddis), on behalf of two North Dakota residents, the Schorsches, who had been involved in an automobile accident in Colorado.[95] Later that same month, Bolinske contacted Herd stating his belief that he would receive one third of the attorney's fees generated from the case, while Gaddis would receive the other two-thirds of the attorney's fees.[96] Herd countered that the topic of fee division had only briefly been raised and that fees would only be divided if Bolinske took part in the case, as Colorado's rules regarding professional conduct did not permit referral fees.[97] Herd agreed to represent the Schorsches and filed a complaint in Colorado district court on their behalf.[98] The Gaddis firm contacted people or entities in North Dakota at least 168 times regarding the representation of the Schorsches.[99] However, all "legal pleadings and discovery were conducted either in or from Colorado."[100] Gaddis deposed a North Dakota doctor over the telephone, but no one from the Gaddis firm ever entered the state of North Dakota for any reason during the litigation period.[101] Bolinske contacted Gaddis in January 2001 regarding the case and was informed that Herd had settled the case on behalf of the Schorsches.[102] Bolinske contacted the Gaddis firm two more times over the next twelve months regarding the fee arrangement and was told by the senior partner that the matter would be checked into. However, in July 2002, Bolinske filed suit in the South Central District Court after no reply was received.[103] The trial court dismissed Bolinske's claim, holding that Bolinske had "failed to demonstrate that Herd subjected himself along with Gaddis to personal jurisdiction in North Dakota."[104] The North Dakota Supreme Court affirmed dismissal of Bolinske's suit, as he failed to demonstrate the applicability of North Dakota Rule of Civil

95. Bolinske v. Herd, 2004 ND 217, ¶ 2, 689 N.W.2d 397, 399.
96. *Id.* ¶ 2.
97. *Id.*
98. *Id.* ¶ 3.
99. *Id.*
100. *Id.*
101. *Id.* The Schorsches' case was settled in Colorado through arbitration. *Id.*
102. *Id.* ¶ 4.
103. *Id.*
104. *Id.* ¶5.

Procedure 4(b)(2) to Herd or Gaddis, and did not "satisfy the first three determinative factors for assessing personal jurisdiction."[105]

The court first explained the test for determining whether it has personal jurisdiction over a party.[106] As a threshold question, the court needed to determine if the forum state's long-arm provision granted jurisdiction over the non-resident defendant, and if so, it needed to then determine if the exercise of personal jurisdiction over the nonresident party provided due process.[107] Satisfaction of due process necessitates that the nonresident defendant have "sufficient minimum contacts with North Dakota so the exercise of personal jurisdiction does not offend traditional notions of fair play and substantial justice."[108] For personal jurisdiction to exist, at least one of the subparagraphs of North Dakota Rule of Civil Procedure 4(b) must be satisfied.[109] In analyzing sub-section 4(b)(2), the court acknowledged that the phrase "transacting business" required expansive interpretation and ought to be "used in a broader sense than merely doing business."[110] The court then cited *Auction Effertz, Ltd. v. Schecher*,[111] which held that initiating contact by telephone or some other electronic medium with a resident in search of a service or product is, in general, sufficient to demonstrate that the nonresident conducted a business transaction "for purposes of establishing personal jurisdiction."[112] However, the court qualified this statement by clarifying that "transacting business . . . does not extend to activities relating to third parties or to other transactions that are not related to the activity in question under Rule 4(b)(2)(B)."[113] The court rejected Bolinske's argument that Herd's use of an interstate telephone system qualified Herd as having conducted business in North Dakota.[114] Bolinske's reliance on *Auction Effertz* was misplaced because in that case, contact with a North Dakota resident was initiated by a nonresident, as compared to the instant case where a resident (Bolinske) initiated the contact by seeking services from a nonresident.[115] Moreover,

105. *Id.* ¶ 18, 689 N.W.2d at 403.

106. *Id.* ¶ 6 at 400.

107. *Id.* (citing Ensign v. Bank of Baker, 2004 ND 56, ¶ 9, 676 N.W.2d 786, 790).

108. *Id.* ¶ 9, 689 N.W.2d at 400-01 (quoting *Ensign*, ¶ 9, 676 N.W.2d at 790).

109. *Id.*

110. *Id.* ¶ 10, 689 N.W.2d at 401 (quoting United Accounts, Inc. v. Quackenbush, 434 N.W.2d 567, 570 (N.D. 1989)).

111. 2000 ND 109, 611 N.W.2d 173.

112. *Bolinske*, ¶ 10, 689 N.W.2d at 401(citing Auction Effertz, Ltd., v. Schecher, 2000 ND 109, ¶8, 611 N.W.2d 173, 177).

113. *Id.*

114. *Id.* ¶ 11. 689 N.W.2d at 401.

115. *Id.*

the court reasoned that since Bolinske solicited Herd to represent the Schorsches in Colorado, any contract would have been entered into in Colorado, not North Dakota.[116] The court stated that "because Herd and Gaddis did not transact business, contract to supply services to Bolinske, or enjoy other legal status in North Dakota, the requirements under North Dakota Rule of Civil Procedure 4(b)(2) had not been satisfied."[117]

The court concluded that because Gaddis and Herd possessed insufficient contacts with North Dakota, the exercise of personal jurisdiction over each of them would "offend traditional notions of justice and fair play under the concept of due process."[118] In reaching this conclusion, the court utilized a five-factor analysis to assess whether personal jurisdiction could be exercised over the nonresident defendants.[119] Of the five factors to be considered, the court stated that the first three factors were determinative: "(1) the nature and quality of a nonresident defendant's contacts with the forum state; (2) the quantity of the nonresident defendant's contacts with the forum state; [and] (3) the relation of the cause of action to the contacts."[120] The last two factors, "the forum state's interest in providing a forum for its residents, and the convenience of the parties" were not as important and therefore were not determinative."[121] The court was persuaded by a Montana Supreme Court case in which Montana residents were referred by a Montana attorney to an Idaho attorney for representation in a claim regarding an automobile accident that occurred in Idaho.[122] Presented with those facts, the Montana Supreme Court held that jurisdiction "was not acquired through interstate communications under a contract to be performed in another state despite the fact the Idaho attorney sent the contingency fee agreement and other letters to Montana."[123] Comparatively, since the "nature, quality, and quantity of the contacts" between Herd, Gaddis, and Bolinske were minimal and initiated by Bolinske, the court found that Gaddis and Herd's contacts did not meet the requirements of factors one and two of the due process personal jurisdiction test.[124]

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116. *Id.*
117. *Id.*
118. *Id.* ¶ 12.
119. *Id.*
120. *Id.*
121. *Id.* at 401-02 (citing Ensign v. Bank of Baker, 2004 ND 56, ¶ 12, 676 N.W.2d 786, 791).
122. *Id.* ¶ 14, 689 N.W.2d at 402 (citing Bird v. Hiller, 892 P.2d 931, 934 (Mont. 1995).
123. *Id.*
124. *Id.* ¶ 15.

CRIMINAL LAW—INCONSISTENT VERDICTS

STATE V. MCCLARY

In *State v. McClary*,[125] Michael J. McClary was convicted of the crime of abuse and neglect of a child.[126] In affirming McClary's conviction, the North Dakota Supreme Court held that the verdicts on separate charges were not inconsistent and were supported by the evidence, and that the trial court did not err in refusing to dismiss the abuse or neglect charge, or in instructing the jury on that charge.[127] Finally, the court held that the trial court did not err in refusing to question the jury about its verdict.[128]

McClary lived with his girlfriend and her fifteen-month-old daughter.[129] On October 15, 2002, the child was pronounced dead at the local hospital because of shaken baby syndrome.[130] Evidence showed that both McClary and his girlfriend had been using drugs, and each was alone with the child.[131] Both adults blamed the other for the child's death.[132]

The State charged McClary with three crimes.[133] First, the State "charged McClary with murder . . . for allegedly causing [the child's] death under circumstances manifesting extreme indifference to the value of human life."[134] Next, the State charged McClary with "committing or attempting to commit a felony offense against a child" and causing the death of a child in the furtherance of the crime.[135] Finally, the State charged McClary with abuse or neglect of a child "for willfully inflicting bodily injury, substantial bodily injury, or serious bodily injury upon a child under the age of six years."[136] The jury found McClary not guilty of murder, but guilty of abuse or neglect of a child.[137] McClary requested that the jury specify the abuse or neglect of which he was guilty, but the court denied this request and also denied his motion for judgment of acquittal on the abuse or neglect charge.[138]

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125. 2004 ND 98, 679 N.W.2d 455.
126. *McClary*, ¶ 1, 679 N.W.2d at 456.
127. *Id.*
128. *Id.* at 456-57.
129. *Id.* ¶ 2, 679 N.W.2d at 457.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.* ¶ 3.
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*

On appeal, McClary argued that the jury verdicts of not guilty on the murder charge and guilty on the child abuse and neglect charge were inconsistent.[139] McClary argued that the court should adopt the more liberal approach of the Alaska Supreme Court on the subject of inconsistent verdicts.[140] The North Dakota Supreme Court declined to do so and instead relied on its decision in *State v. Klose*[141] to find that the verdicts were consistent.[142] According to *Klose*, inconsistent verdicts should be reconciled by "examining both the law in the case and the evidence to ascertain whether the verdict represents a logical and probable decision on the relevant issues submitted to the jury."[143]

In its instructions, the trial court stated that the jury could find McClary guilty of murder if it found McClary had willfully caused the child's death under extreme indifference for human life.[144] The jury was also instructed that it could find McClary guilty if he "committed or attempted to commit a felony offense against a child and, in the course of and in furtherance of such crime, caused . . . [the child's death]."[145] The court determined that certain terminology used in the jury instructions was confusing and should have been avoided.[146] The court also noted that the "felony offense" that needed to be committed for felony murder was never defined.[147] Therefore, the jury's verdicts could be rationally explained and were not inconsistent.[148]

McClary first argued it was obvious error that the trial court failed to dismiss the abuse or neglect of a child count, and that the court further

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139. *Id.* ¶ 4.

140. *Id.* At the time of the *McClary* case, the court followed the approach of the United States Supreme Court in *United States v. Powell*, 469 U.S. 57 (1984). In *Powell*, the Court upheld a conviction based on an inconsistent verdict because "[t]he most that can be said . . . is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt." *Powell*, 469 U.S. at 64-65 (quoting Dunn v. United States, 284 U.S. 390, 393 (1932)). Under this approach, the defendant could challenge the sufficiency of the evidence supporting the guilty verdict, and where the evidence was sufficient to sustain a conviction on the compound offense, it was speculation to suggest that the conviction was a mistake and that the acquittal on the predicate offense was the verdict the jury really meant. *Id.* at 67-68. Meanwhile, Alaska declined to follow this rationale based on state law and required consistent verdicts on multiple counts against a single defendant. DeSacia v. State, 469 P.2d 369, 375-78 (Alaska 1970).

141. 2003 ND 39, 657 N.W.2d 276.

142. *McClary*, 2004 ND 98, ¶¶ 13-14, 679 N.W.2d at 462.

143. *Klose*, ¶ 44, 657 N.W.2d at 286 (quoting Moszer v. Witt, 2001 ND 30, ¶ 11, 622 N.W.2d 223, 229).

144. *McClary*, ¶¶ 14, 16 679 N.W.2d at 462.

145. *Id.* ¶ 16, 679 N.W.2d at 462-63.

146. *Id.* at 463.

147. *Id.*

148. *Id.* ¶ 17.

instructed the jury on that count.[149] He contended that these obvious errors violated double jeopardy.[150] However, the court rejected the double jeopardy argument because McClary was only prosecuted once on two different charges.[151] The court also rejected McClary's assertion of trial court error in instructing the jury on the abuse or neglect charge.[152] The court noted that McClary's argument ignored that he was charged under alternative theories of murder and that abuse or neglect of a child is not a lesser-included offense of felony murder.[153]

Secondly, McClary argued that the trial court erred when it refused to question the jury regarding its guilty verdict.[154] The court noted that while the statute required the judge to ascertain whether the verdict conformed to the law of the case, nothing in the statute's language required the court to question the jurors about how they reached their verdict.[155] Therefore, the court found that the trial court did not err in refusing to question the jurors regarding the verdict.[156] Finally, McClary argued that the trial court erred in denying his motion for judgment of acquittal and for a new trial.[157] The North Dakota Supreme Court found sufficient evidence to support the conviction and held that the trial court did not abuse its discretion in denying the motion for a new trial.[158] As a result, the court affirmed McClary's convictions on child abuse and neglect charges.[159]

CRIMINAL LAW—REASONABLE SUSPICION—SUPPRESSION OF EVIDENCE—SEARCHES AND SEIZURES

STATE V. SMITH

In *State v. Smith*,[160] Jesse Smith appealed two convictions for "unlawful possession of drug paraphernalia and possession of a controlled substance."[161] The North Dakota Supreme Court determined that there was

149. *Id.* ¶ 18.
150. *Id.* ¶ 20, 679 N.W.2d at 464.
151. *Id.*
152. *Id.* ¶ 22.
153. *Id.*
154. *Id.* ¶ 23.
155. *Id.* ¶¶ 23-24, 679 N.W.2d at 465.
156. *Id.* ¶ 24.
157. *Id.* ¶ 25.
158. *Id.* ¶¶ 26-27.
159. *Id.* ¶ 28.
160. 2005 ND 21, 691 N.W.2d 203.
161. *Smith*, ¶ 1, 691 N.W.2d at 206.

no reasonable and articulable suspicion for the stop and therefore reversed the convictions and remanded the case for further proceedings.[162]

On May 25, 2002, Fessenden Police Chief Allen Kluth received information about a suspicious vehicle leaving the Cenex station parking lot after being approached by two local citizens.[163] Chief Kluth testified that the two citizens told him about a green station wagon pulling quickly out of the parking lot and spinning.[164] The two citizens told Chief Kluth they followed the vehicle, but were unable to get a complete license plate number because the vehicle was traveling rapidly.[165] The Cenex station had been broken into several times, so Chief Kluth and Highway Patrol Officer Skogen went to look at the tire tracks.[166] Chief Kluth then contacted Harvey Police Officer Balfour and told him to watch for a westbound green station wagon.[167] Officer Balfour testified he observed a green station wagon and then radioed a description of the vehicle to Chief Kluth, who instructed Officer Balfour to stop the vehicle.[168] Officer Balfour also testified that there were no observable traffic violations when he pulled the vehicle over.[169]

Upon approach of the vehicle, Officer Balfour observed an open case of beer in the back seat and noticed a strong odor of alcohol from inside the vehicle.[170] Officer Balfour asked Smith to return to the police car with him and "told Smith of the suspicious activity in the Cenex parking lot."[171] Smith explained that he and his friend needed to use the bathroom at the Cenex station, but the store was closed, "so they went outside by the bulk fuel truck."[172] Officer Balfour testified that Smith then gave him permission to search his vehicle.[173]

Officer Balfour told Patrolman Skogan of Smith's consent to a search of his vehicle upon Skogan's arrival at the scene.[174] Officer Balfour took Smith's passenger, 20-year-old Travis Cunningham, and placed him in the back of his police car.[175] Officer Balfour testified he saw two spilled cans

162. *Id.* ¶ 32, 691 N.W.2d at 213.
163. *Id.* ¶ 2, 691 N.W.2d at 206.
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.* ¶ 3.
171. *Id.* at 207.
172. *Id.*
173. *Id.*
174. *Id.* ¶ 4.
175. *Id.*

of beer on the floor of the vehicle and a backpack in the backseat containing "eight rolled baggies of marijuana."[176]

Smith was charged with four counts, including possession of drug paraphernalia, possession of a controlled substance, possession of a controlled substance with the intent to deliver, and delivery of alcohol to a person under twenty-one.[177] The district court consolidated the charges, and Smith moved to suppress not only all of his statements made during the arrest, but also all of the items seized in the arrest.[178] In October 2003, the district court denied Smith's motion to suppress, and in March 2004, a jury found him guilty of all charges except intent to distribute.[179] Smith appealed his conviction on possession of drug paraphernalia and possession of a controlled substance.[180] Initially, the State claimed Smith lost his right to appeal based on a discrepancy in the case numbers on his motion to suppress.[181] However, the North Dakota Supreme Court concluded the discrepancy was a clerical error, and therefore Smith retained his right to appeal.[182]

The court noted that a traffic stop is considered a seizure under the Fourth Amendment and summarized the elements of a "Terry" stop.[183] To justify a Fourth Amendment intrusion, the investigating officer must possess "a reasonable suspicion that a law has been or is being violated."[184]

The State argued the facts in *State v. Corum*[185] were similar to the facts in the present case.[186] In *Corum*, the court stated a known area of criminal activity represented an articulable fact, but not enough to give rise to a reasonable suspicion of unlawful activity.[187] The additional facts of a vehicle stopped on the highway at 4:00 a.m. near a previously burglarized anhydrous ammonia tank, with two occupants being outside with a flashlight, justified the investigative stop of the vehicle.[188]

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176. *Id.*
177. *Id.* ¶ 5.
178. *Id.*
179. *Id.* ¶ 6.
180. *Id.* ¶ 10. 691 N.W.2d at 208.
181. *Id.* ¶ 8, 691 N.W.2d at 207-08.
182. *Id.* ¶ 10, 691 N.W.2d at 208.
183. *Id.* ¶ 12. A Terry stop analysis requires the court to: "(1) determine whether the facts warranted the intrusion of the individual's Fourth Amendment rights, and if so, (2) determine whether the scope of the intrusion was reasonably related to the circumstances which justified the interference in the first place." *Id.* (quoting State v. Sarheqyi, 492 N.W.2d 284, 286 (N.D. 1992)).
184. *Id.*
185. 2003 ND 89, 663 N.W.2d 151.
186. *Smith*, ¶ 18, 691 N.W.2d at 209.
187. *Id.* (citing *Corum*, ¶ 13, 663 N.W.2d at 155-56).
188. *Id.* (citing *Corum*, ¶ 16, 663 N.W.2d at 156).

Smith argued the facts in *State v. Sarhegyi*[189] were similar to the facts in his case.[190] In *Sarhegyi*, the officer noticed the presence of an occupied vehicle stopped in a parking lot late at night.[191] The *Sarhegyi* court concluded the fact that the car began to leave as the officer approached was not sufficient to create reasonable suspicion to initiate an investigative stop.[192]

The *Smith* court concluded the facts were closer to the fact pattern in *Sarhegyi*.[193] Smith and Cunningham were sitting in their car in the Cenex station parking lot around midnight.[194] The court did not consider the fact that Smith and Cunningham pulled out of the parking lot at a high rate of speed as two strangers approached their vehicle to be unreasonable or suspicious.[195]

The court rejected several different theories advanced by the state to justify the unlawful search and seizure.[196] The court concluded none of the remedial measures suggested by the state could overcome the unlawful stop of the vehicle.[197] Therefore, finding no reasonable and articulable suspicion for the stop, the court reversed the judgments and remanded the case.[198]

CRIMINAL LAW—SEARCHES AND SEIZURES—ARREST

STATE V. LINGHOR

Matthew Linghor was a passenger in a vehicle when a Williams County deputy sheriff commenced a traffic stop of that vehicle.[199] Upon stopping the vehicle, the deputy detected the odor of anhydrous ammonia emanating from the vehicle and saw in plain view in the back seat what he determined were drug-manufacturing materials.[200] While awaiting assistance, the deputy questioned William Ostwald, the driver.[201] Ostwald claimed that one of the items in the back seat of the car, a can of paint

189. 492 N.W.2d 284 (N.D. 1992).

190. *Smith*, ¶ 19, 691 N.W.2d at 209-10.

191. *Id.* at 210 (citing *Sarhegyi*, 492 N.W.2d at 287).

192. *Id.*

193. *Id.* ¶ 20.

194. *Id.*

195. *Id.* The court noted that fleeing from a marked police vehicle could be considered suspicious and unreasonable. *Id.*

196. *Id.* ¶ 29, 691 N.W.2d at 212. The State suggested search incident to arrest, the automobile exception, and inevitable discovery to justify the unlawful arrest. *Id.* ¶ 28.

197. *Id.* ¶¶ 25-29, 691 N.W.2d at 211-12.

198. *Id.* ¶¶ 23-33, 691 N.W.2d at 211-13.

199. State v. Linghor, 2004 ND 224, ¶ 2, 690 N.W.2d 201, 203.

200. *Id.*

201. *Id.*

thinner, belonged to Linghor.[202] After the requested assistance arrived on the scene, it was determined that the car was in fact a mobile methamphetamine laboratory, and Ostwald was placed under arrest.[203] Linghor was subsequently removed from the automobile, subjected to a pat-down search, and was requested to empty the contents of his pockets.[204] Linghor complied and produced a Wal-Mart receipt that listed items that were both present in the vehicle, and as noted by the officers, capable of being used in the manufacture of methamphetamine.[205] Approximately twenty minutes after discovery of the receipt, Linghor was formally placed under arrest.[206] Further interviews of Ostwald and Linghor conducted at the scene between the time of the production of the receipt by Linghor and Linghor's formal arrest resulted in Linghor and Ostwald's alleged confirmation that Linghor had indeed purchased certain items listed on the receipt.[207]

At trial, Linghor's attempts to suppress the Wal-Mart receipt and his statements admitting that he purchased the items listed thereon were unsuccessful, and the receipt, as well as the statements, were admitted into evidence.[208] After Linghor's trial resulted in a hung jury, the State retried Linghor, this time including an additional State witness who "resolved factual inconsistencies in the State's case," and Linghor was subsequently convicted.[209]

All evidence obtained by an unreasonable search or seizure may not be admitted into evidence in accordance with the Fourth Amendment of the United States Constitution and Article 1, Section 8 of the North Dakota Constitution.[210] In the instant case, a warrantless search was conducted which led to the discovery of the Wal-Mart receipt.[211] Therefore, in order for the Wal-Mart receipt to be admitted into evidence, the search that uncovered the receipt must be shown to have fallen "within a recognized exception to the warrant requirement."[212] The exception considered by the court as being applicable to the request for admission of the Wal-Mart receipt was the "search incident to a valid custodial arrest" exception.[213]

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202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.* at 203-04.
209. *Id.* at 204.
210. *Id.* ¶ 4.
211. *Id.*
212. *Id.* (citing State v. Kunkel, 455 N.W.2d 208, 209-10 (N.D. 1990)).
213. *Id.* ¶ 5, 690 N.W.2d at 205.

Two major considerations were discussed by the court with regard to the applicability of this exception: (1) whether Linghor's presence in the automobile was, by itself, sufficient to create probable cause to conduct the search in question; and (2) whether the twenty-minute delay between the discovery of the Wal-Mart receipt and Linghor's formal arrest violated the search incident to a valid custodial arrest exception.[214]

The court applied the reasoning utilized by the United States Supreme Court in the factually analogous case *Maryland v. Pringle*[215] in determining whether Linghor's presence in the automobile was, by itself, sufficient to create probable cause to conduct the search in question.[216] The *Pringle* Court articulated probable cause as a "fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules."[217] Therefore, if there] is a reasonable ground for belief of guilt, and that belief . . . particularized with respect to the person to be searched or seized" probable cause will be found to exist.[218] The *Linghor* court further clarified that under the *Pringle* standard for determining whether such reasonable ground existed was that of an objectively reasonable police officer.[219]

The court concluded that Linghor's presence in the automobile was, by itself, sufficient to create probable cause.[220] In reaching this conclusion, the court cited factors that distinguished the instant case and *Pringle* from other cases such as *Ybarra v. Illinois*, [221] where the mere propinquity of persons was relied upon to create probable cause.[222] In both the instant case and *Pringle*, the parties in question were passengers in an automobile subjected to a traffic stop, as opposed to the situation in *Ybarra* where the party in question was an unwitting patron of a public tavern subjected to a search by virtue of officers investigating an unrelated incident.[223] The court in the instant case relied upon the line of reasoning established in *Wyoming v. Houghton*,[224] that "a car passenger—unlike the unwitting tavern patron in

214. *Id.* ¶ 6.

215. 540 U.S. 366, 370 (2003).

216. *Id.* ¶ 6.

217. *Id.* ¶ 10, 690 N.W.2d at 206 (quoting Maryland v. Pringle, 540 U.S. 366, 400 (2003)).

218. *Id.; see also Pringle*, 540 U.S. at 370-71 (articulating the standard of probable cause established by the Court).

219. *Linghor*, ¶ 10, 690 N.W.2d at 206 (citing State v. Overby, 1999 ND 47, ¶ 13, 590 N.W.2d 703, 707).

220. *Id.* ¶ 12.

221. 444 U.S. 85 (1979).

222. *Linghor*, ¶ 12, 690 N.W.2d at 206.

223. *Id.*

224. 526 U.S. 295 (1999).

Ybarra—will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or the evidence of their wrongdoing."[225] Thus, in light of the circumstances, the court found that an inference of common enterprise between Linghor and the other passengers in the car was reasonable, especially where large amounts of drug paraphernalia and the "immediately noticeable" smell of anhydrous ammonia coming from the automobile were present.[226] The court concluded that the existence of the drug paraphernalia and the smell from the car could lead "a reasonable officer [to] conclude that there was probable cause to believe [Linghor] committed the crime of possession of [drug paraphernalia relating to methamphetamine] either solely or jointly."[227]

In determining whether the twenty-minute delay between the discovery of the Wal-Mart receipt and Linghor's formal arrest violated the search incident to a valid custodial arrest exception, the court noted that "an officer's subjective intent or outward statements do not necessarily control whether, or when, a party is under arrest."[228] The court further clarified that when an arrest occurs is determined through a totality of the circumstances test.[229] The court articulated that "an arrest can occur before an officer formally informs a suspect he is under arrest . . . [t]he proper, objective test asks whether circumstances existed that would have caused a reasonable person to conclude he was under arrest and not free to leave."[230] The court stated that a reasonable person in Linghor's situation would have determined that he was under arrest at the time that he was removed from the automobile by the officer conducting the traffic stop.[231] As the court elaborated, "[W]e do not believe a reasonable person, found in an automobile smelling of anhydrous ammonia with an abundance of drug paraphernalia in plain sight, would feel free to exit the car, much less leave the crime scene."[232]

Additionally, Linghor argued that the conviction from his second trial should be overturned because the district court erred in declaring a mistrial and hung jury in the first case, thereby creating a double jeopardy violation.[233] Linghor contended that a short jury deliberation period prior to

225. *Linghor*, ¶ 11, 690 N.W.2d at 207.
226. *Id.* ¶¶ 11-12.
227. *Id.* ¶ 12 (citations omitted).
228. *Id.* ¶ 14, 690 N.W.2d at 207-08.
229. *Id.* at 208.
230. *Id.* (citing Wishnatsky v. Bergquist, 1996 ND 156, ¶ 15, 550 N.W.2d 394, 398).
231. *Id.* ¶ 15.
232. *Id.*
233. *Id.* ¶ 18, 690 N.W.2d at 209.

the jury's announcement that it was hung, and the jury's inability to answer "relatively simple factual questions as to which there were inconsistencies in the State's case," necessitated that the case be overturned on double jeopardy grounds.[234] However, the court cited precedent which clarified that "in cases which a mistrial has been declared prior to verdict, the conclusion that jeopardy has attached begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial."[235] The court noted that the Double Jeopardy Clause does not always prohibit retrial when the first trial was terminated before a verdict was reached.[236] The critical determination, the court stated, was "what, if anything, the State did during the trial to trigger a dismissal."[237] In this case, the prosecution pinpointed the confusion that led to the hung jury and mistrial in the first case, a discrepancy regarding numbers printed on a hardware store receipt, and consequently clarified it.[238] The court concluded that although this clarification "presumably aided the State, this is not the type of benefit that implicates the Double Jeopardy Clause."[239] Because every case involves decisions about what evidence should be presented to a jury, mistakes are inevitable, and simply because confusion ensues and a jury is unable to reach a verdict, this does not necessarily lead to double jeopardy.[240]

CRIMINAL LAW—SEARCHES AND SEIZURES—SUPPRESSION OF EVIDENCE

STATE V. GUSCETTE

In *State v. Guscette*,[241] Stephanie Guscette appealed her conviction for possession of drug paraphernalia.[242] Guscette entered a conditional guilty plea, which reserved her right to appeal the denied motion to suppress evidence found in her purse as a result of a vehicle search by law enforcement.[243] The North Dakota Supreme Court affirmed the district court and held that there was sufficient evidence showing that Guscette had not been seized under the Fourth Amendment when law enforcement searched her

234. *Id.*
235. *Id.* ¶ 20 (citing Illinois v. Somerville, 410 U.S. 458, 467 (1973)).
236. *Id.* at 210 (citing State v. Allesi, 216 N.W.2d 805, 814 (N.D. 1974)).
237. *Id.*
238. *Id.* ¶¶ 23-24, 690 N.W.2d at 211-12.
239. *Id.* ¶ 25.
240. *Id.*
241. 2004 ND 71, 678 N.W.2d 126.
242. *Guscette*, ¶ 1, 678 N.W.2d at 127.
243. *Id.* ¶ 4, 678 N.W.2d at 128.

vehicle, and that her consent to the vehicle search was sufficient to search her purse contained inside the vehicle.[244]

On February 4, 2003, a Fargo police officer stopped Guscette for a broken taillight.[245] The officer informed Guscette the reason for the stop and asked to check her driver's license.[246] The officer checked the driver's license and upon returning the license to her, asked Guscette about her vehicle insurance and the whereabouts of Corey Mock.[247] While continuing to speak to Guscette, the officer had her step out of the vehicle.[248] The officer then informed her that he was only giving her a warning and she was free to leave.[249] Before Guscette left, the officer asked her if she had any "weapons, needles, knives, or anything else illegal in the vehicle."[250] Guscette replied that she did not.[251] The officer then asked for permission to search the car, and Guscette consented.[252] During the search, the officer found drug paraphernalia in a black purse that was located in the front seat of the vehicle.[253] The officer testified that after he found the contraband, he heard Guscette recite to the other officer that she had consented to a search of the vehicle and not her purse; Guscette contended that the officer had not yet found the paraphernalia when she objected to the search of her purse.[254]

While Guscette admitted that the initial traffic stop was valid, she argued that her Fourth Amendment right to be free of unreasonable seizure was violated when the officer continued to detain her beyond the time necessary to complete the initial stop.[255] The court cited *State v. Mertz*[256] for the standard of a reasonable investigatory stop.[257] Under this standard, the stop may continue as long as reasonably necessary to conduct the duties resulting from the stop.[258] Once these activities are concluded, the officer violates the Fourth Amendment if he continues to detain the individual

244. *Id.* ¶ 1, 678 N.W.2d at 127.
245. *Id.* ¶ 2.
246. *Id.*
247. *Id.* Corey Mock was a roommate of Guscette whom law enforcement had been trying to locate. *Id.* ¶ 19, 678 N.W.2d at 132.
248. *Id.* ¶ 2, 678 N.W.2d at 127.
249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.*
254. *Id.*
255. *Id.* ¶ 6, 678 N.W.2d at 128.
256. 32 N.W.2d 410 (N.D. 1985).
257. *Guscette*, ¶ 7, 678 N.W.2d at 129.
258. *Id.*

without having reasonable suspicion of other criminal activity.[259] The North Dakota Supreme Court found that since the officer returned Guscette's driver's license and told her she was free to leave before he asked for permission to search the vehicle, Guscette was not seized under the Fourth Amendment.[260]

The court then considered the validity of the consent received to search the vehicle.[261] To determine whether consent is valid, the court must look at the voluntariness of the consent under the totality of circumstances to determine whether the consent was a product of free choice and not a product of coercion.[262] The court must look to "the characteristics and condition of the accused at the time [he or she] confessed or consented and . . . the details of the setting in which the consent or confession was obtained," and no one factor alone can be determinative.[263] The court then upheld the trial court's findings that Guscette was not threatened or forced to consent and the consent was not a product of coercion; Guscette admitted that at no time during the incident was she nervous.[264] Therefore, the court concluded that under the totality of the circumstances, Guscette voluntarily consented to the search.[265]

Finally, the court determined whether the consent covered the whole scope of the search.[266] In *Florida v. Jimeno*,[267] the United States Supreme Court determined that "general consent to search a car includes a consent to search containers within the vehicle which may contain the items sought."[268] The North Dakota Supreme Court found that since the officer was searching for "weapons, knives or anything else illegal in the vehicle," and these items could have been found in the purse, the officer was reasonable in searching the purse.[269] Guscette put no limitation on her initial consent to search, and if she did indeed withdraw her consent, it was after the contraband had already been discovered.[270] Therefore, the court

259. *Id.*
260. *Id.* ¶¶ 9-10, 678 N.W.2d at 130.
261. *Id.* ¶ 11, 678 N.W.2d at 131.
262. *Id.* (citing City of Fargo v. Ellison, 2001 ND 175, ¶ 13, 635 N.W.2d 151, 155).
263. *Id.*
264. *Id.* ¶ 12.
265. *Id.*
266. *Id.* ¶ 13.
267. 500 U.S. 248 (1991).
268. *Guscette*, ¶ 14, 678 N.W.2d at 131 (citing *Jimeno*, 500 U.S. at 251).
269. *Id.*
270. *Id.*

affirmed the district court, ruling that the consent was valid and the paraphernalia was within the scope of the voluntary consent search.[271]

Justice Maring dissented, finding that the detention was an unreasonable seizure and that the consent was not given under circumstances sufficient to purge the taint of the illegal detention.[272] The dissent pointed out that prior to Guscette giving her voluntary consent to search the vehicle, the officer had been questioning her about drug charges that were currently pending against Guscette, and about Corey Mock, her roommate.[273] This was beyond the scope of information needed to complete the traffic stop, and therefore the officer had illegally detained her with the continued questions.[274] Given the illegal detention, the circumstances surrounding the consent must have been sufficient to purge the taint of illegality in order for the consent to be valid.[275] Justice Maring argued that the taint could not have been purged merely by the officer informing Guscette she was only receiving a verbal warning and telling her that "you are free to leave."[276]

Chief Justice VandeWalle also wrote separately to point out that this case was not in fact analogous with *State v. Everson*,[277] and to assert his agreement with Justice Maring's dissent.[278]

CRIMINAL LAW—SEARCHES AND SEIZURES—WAIVER AND CONSENT

STATE V. MITZEL

Ryan Mitzel appealed a district court criminal conviction entered upon a conditional guilty plea for possession of marijuana with intent to deliver and possession of drug paraphernalia.[279] Mitzel claimed was obtained in violation of his Fourth and Fifth Amendment rights, and therefore argued that the district court erred in denying his motion to suppress that evidence.[280] In an opinion written by Justice Sandstrom, the North Dakota Supreme Court reversed and remanded.[281] The court concluded that the district court erred when it denied Mitzel's motion to suppress.[282]

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271. *Id.* at 131-32.
272. *Id.* ¶¶ 37-38, 678 N.W.2d at 137 (Maring, J., dissenting).
273. *Id.* ¶¶ 19-20, 678 N.W.2d at 132.
274. *Id.* ¶¶ 25-26, 678 N.W.2d at 133.
275. *Id.* ¶ 31, 678 N.W.2d at 134 (citing Brown v. Illinois, 422 U.S. 590, 603-04 (1975)).
276. *Id.* ¶ 37, 678 N.W.2d at 137.
277. 474 N.W.2d 695 (N.D. 1991).
278. *Guscette*, ¶¶ 41-42, 678 N.W.2d at 137-38 (VandeWalle, C.J., dissenting).
279. State v. Mitzel, 2004 ND 157, ¶ 1, 685 N.W.2d 120.
280. *Id.* at 122.
281. *Id.*
282. *Id.*

In 2003, two Bismarck police officers were called to Mitzel's apartment to investigate a report of a domestic dispute.[283] After being allowed into the apartment, one of the officers followed Mitzel down a hallway toward a back bedroom.[284] The officer smelled marijuana and asked Mitzel for permission to search the bedroom, but Mitzel refused.[285] Mitzel was then arrested for possession of marijuana.[286] After the arrest, the police attempted to obtain a search warrant.[287] A detective with the Bismarck Police Department testified that it was taking some time to obtain a warrant, and during this time, Mitzel said he did not want to wait any longer and gave consent for a search of the bedroom.[288] A search warrant was subsequently not obtained because of Mitzel's alleged consent.[289] Mitzel entered a conditional plea of guilty, but reserved the right to appeal the denial of his motion to suppress.[290] Mitzel was convicted of possession of marijuana with intent to deliver and possession of drug paraphernalia.[291]

On appeal, Mitzel argued that the district court erred in denying his motion to suppress evidence found during a search of his apartment, claiming he did not give consent for police to follow him to the bedroom.[292] Mitzel also claimed that there were no exigent circumstances justifying the search and that his later consent was involuntary, and thus obtained in violation of his Miranda rights.[293]

The North Dakota Supreme Court began its analysis by explaining that searching a home without a warrant is presumptively unreasonable.[294] However, searches inside a home are not unreasonable if the search falls within one of the exceptions to the search warrant requirement.[295] If no such exception exists, the evidence must be suppressed as inadmissible.[296]

The court began by discussing one exception to a warrantless search—consent.[297] Consent is measured objectively by what a reasonable

283. *Id.* ¶ 2, 685 N.W.2d at 122.
284. *Id.*
285. *Id.*
286. *Id.*
287. *Id.* ¶ 6, 685 N.W.2d at 123.
288. *Id.*
289. *Id.* ¶ 5.
290. *Id.* ¶ 7.
291. *Id.*
292. *Id.*
293. *Id.*
294. *Id.* ¶ 11 (citing State v. Matthews, 2003 ND 108, ¶ 10, 665 N.W.2d 28, 31-32).
295. *Id.*
296. *Id.* ¶ 12.
297. *Id.* ¶ 13, 685 N.W.2d at 124.

person would have understood the exchange to be.[298] To show consent, the State must point to affirmative conduct by the person alleged to have consented.[299] The court determined that the findings of fact in the present case were insufficient to show consent.[300] Therefore, the court held that the district court's findings were "based on an erroneous conception of law" and were "insufficient to constitute consent."[301]

Next, the court discussed a second exception to a warrantless search, exigent circumstances.[302] Exigent circumstances are present when there is an emergency situation that requires quick action to prevent imminent danger to life, serious damage to property, or to stop the imminent escape of a suspect or the destruction of evidence.[303] The court held that although domestic disputes can erupt without notice, the facts in this case were insufficient to indicate an immediate search of the apartment was justified.[304] The court stated that there was no evidence that Mitzel prevented the police from entering the apartment, that Mitzel was violent or intoxicated, or that there was an altercation or other emergency.[305] The court concluded that because no warrant exception applied, the search was unlawful and all evidence obtained from the search must be suppressed as inadmissible under the exclusionary rule.[306]

The court then addressed Mitzel's argument that the district court erred in finding that his consent to search was valid.[307] The district court did not appear to have considered the totality of the circumstances when addressing the validity of the consent.[308] The court stated that because the evidence obtained from the search must be excluded, there was no basis to arrest Mitzel.[309] There were also two officers present when Mitzel consented, but Mitzel was not given his Miranda warning until after he consented to the search.[310] The court held that the district court misapplied the law when it determined that Mitzel's written consent to search was valid, and

298. *Id.*
299. *Id.* ¶ 14.
300. *Id.* ¶ 16, 685 N.W.2d at 125.
301. *Id.* ¶ 18, 685 N.W.2d at 126.
302. *Id.* ¶ 19.
303. *Id.*
304. *Id.* ¶ 22.
305. *Id.* ¶¶ 22-23, 685 N.W.2d at 126-27.
306. *Id.*
307. *Id.* ¶ 24, 685 N.W.2d at 127.
308. *Id.* ¶ 27.
309. *Id.* ¶ 29, 685 N.W.2d at 128.
310. *Id.*

subsequently reversed the criminal judgment, vacated the order denying the motion to suppress, and remanded the case.[311]

Chief Justice Gerald VandeWalle dissented in the case, and argued that the district court incorrectly applied the law to the facts of the case.[312] The Chief Justice contended that exigent circumstances existed to justify the police officers' actions.[313] Mitzel had invited the police into the home.[314] Once the police were inside the home, the potential danger to the officers was much greater than any danger to them outside the home.[315] This danger gave the officers greater latitude, even though it did not give the officers freedom to wander freely throughout the home.[316] Chief Justice VandeWalle argued that Mitzel's consent was not necessary under the facts of this case, as another exigent circumstance was that the police could not see the woman whom they had been sent to protect.[317]

The Chief Justice stated that the officer's warrantless search was justified under the exigent circumstances exception to the warrant requirement.[318] The Chief Justice believed that the ensuing arrest was not illegal and that the subsequent search of the home was voluntary, and therefore valid under the circumstances.[319]

CRIMINAL LAW—SENTENCING AND PUNISHMENT

GREYBULL V. STATE

In *Greybull v. State*,[320] Danielle Greybull appealed the trial court's denial of her application for post-conviction relief.[321] Upon review, the North Dakota Supreme Court affirmed the trial court's decision on two grounds.[322] First, the court held that Greybull failed to demonstrate that the prosecutor's notice of intent to enhance her sentence was not filed within a reasonable time prior to the trial, or that Greybull was prejudiced by a late filing of notice.[323] Second, the court held that it was harmless error when

311. *Id.* ¶ 30.
312. *Id.*
313. *Id.*
314. *Id.* ¶ 33.
315. *Id.* at 129.
316. *Id.*
317. *Id.* ¶¶ 34-35.
318. *Id.* ¶ 36.
319. *Id.*
320. 2004 ND 116, 680 N.W.2d 254.
321. *Greybull*, ¶ 1, 680 N.W.2d at 255.
322. *Id.*
323. *Id.*

the trial court failed to have the jury find the predicate facts supporting Greybull's enhanced sentence.[324]

In 1997, Greybull was convicted of manslaughter in the stabbing death of Charlene Yellow Bear.[325] The trial court ruled that she was a "dangerous special offender" under North Dakota Century Code section 12.1-32-09.[326] Thus, the trial court sentenced her to the maximum of twenty years in prison.[327] Upon appeal, the North Dakota Supreme Court affirmed the sentence and the conviction.[328] Following the denial of her appeal, Greybull filed two applications for post-conviction relief, which were both denied.[329]

In this, her third application for relief, Greybull raised two issues.[330] First, she asserted that the United States Supreme Court's decision in *Apprendi v. New Jersey*[331] should be retroactively applied to her case.[332] Second, she asserted that the prosecutor did not file a timely notice of intent to enhance her sentence.[333]

The North Dakota Supreme Court addressed the second argument first.[334] Greybull argued that the prosecutor failed to provide the court with adequate notice of his intent to seek an enhanced penalty under North Dakota Century Code section 12.1-32-09(3).[335] The prosecutor in the case filed notice twenty days prior to trial.[336] The court rejected Greybull's argument because she failed to assert that she had been prejudiced by lack of notice.[337] Furthermore, the court held that Greybull's failure to raise this issue earlier was an abuse of process, and therefore the argument had been waived.[338]

Next, the court addressed Greybull's argument that *Apprendi* be applied retroactively to her case.[339] The court explained that *Apprendi* stood for the proposition that facts used to enhance a criminal sentence

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324. *Id.*
325. *Id.* ¶ 2.
326. *Id.*
327. *Id.*
328. *Id.* (citing State v. Greybull, 1998 ND 102, ¶ 30, 579 N.W.2d 161, 165).
329. *Id.*
330. *Id.*
331. 530 U.S. 466 (2000).
332. *Greybull*, 2004 ND 116, ¶ 2, 680 N.W.2d 254, 255.
333. *Id.*
334. *Id.* ¶ 3.
335. *Id.* Section 12.1-32-09(3) required the prosecutor to sign and file a notice of his intention to seek an enhanced penalty with the court "at a reasonable time before trial or acceptance by the court of a plea of guilty." *Id.*
336. *Id.*
337. *Id.* ¶ 4.
338. *Id.* ¶ 5, 680 N.W.2d at 256.
339. *Id.* ¶ 6.

beyond the statutory maximum must be decided not by the court, but by a jury beyond a reasonable doubt.[340] Although the North Dakota Supreme Court had not previously determined this issue, the court had held that failure to retroactively apply *Apprendi* could constitute harmless error.[341] The court noted that "[t]he one category of offenders deemed, per se, dangerous is the category of offenders who use firearms, dangerous weapons, or destructive devices in the commission of an offense."[342] In the instant case, Greybull used a dangerous weapon, a knife, to kill the victim.[343] She argued self-defense at trial.[344] According to the court, "The only predicate fact upon which Greybull's sentence has been enhanced under the special dangerous offender statute is that she used a dangerous weapon to commit her crime. That fact was never in dispute."[345] Thus, the court held that the failure of the jury to find that obvious fact was harmless error and affirmed the order denying Greybull's application for post-conviction relief.[346]

EMPLOYMENT LAW—RETALIATORY DISCHARGE

HENG v. ROTECH MEDICAL CORP.

In *Heng v. Rotech Medical Corp.*,[347] plaintiff Debora Heng appealed a summary judgment dismissal of her retaliatory discharge and breach of contract claims against the defendant, Rotech Medical Corporation, doing business as Arrowhealth Medical Supply (Arrowhealth), and the award of attorney's fees to Rotech.[348] The North Dakota Supreme Court affirmed the decision to dismiss the breach of contract claim, but reversed the dismissal of the retaliatory discharge claim.[349]

Arrowhealth supplied medical equipment to patients' homes, and Heng was a manager at the Fargo Arrowhealth office.[350] As a part of its business, Arrowhealth allowed its service technicians to assemble oxygen delivery systems and instruct patients how to use them, even though the technicians

340. *Id.*
341. *Id.* ¶ 8 (citing Clark v. State, 2001 ND 9, ¶ 9, 621 N.W.2d 576, 579).
342. *Id.* ¶ 10, 680 N.W.2d at 257 (citing State v. Wells, 265 N.W.2d 239, 245 (N.D. 1978)).
343. *Id.*
344. *Id.*
345. *Id.*
346. *Id.* ¶¶ 10-11.
347. 2004 ND 204, 688 N.W.2d 389.
348. *Hend,* ¶ 1, 688 N.W.2d at 393.
349. *Id.*
350. *Id.* ¶ 2.

were not licensed to do so.[351] When a new service technician was hired in November 2001, the new employee informed Heng that Arrowhealth's practice violated North Dakota law.[352] Heng brought this information to the regional manager, Adam Blumenshein, who assured her that Arrowhealth's practices were legal.[353] On December 19, 2001, Heng again expressed concern about the practice, this time to Arrowhealth's Corporate Compliance Coordinator, Julie Johnson.[354] Arrowhealth then obtained a copy of the relevant North Dakota law, and Blumenshein concluded that Arrowhealth was not in violation of the law.[355] Heng then called the North Dakota Respiratory Care Board (Board) anonymously and inquired about the regulation.[356] Heng was told that Arrowhealth's service technicians were performing illegal functions by assembling the oxygen delivery systems without a license.[357] Heng again contacted Johnson, who told Heng to stop the service technicians from assembling the systems, but not to tell anyone about the issue.[358] Both Blumenshein and Johnson met with Heng on January 3, 2002, and they discussed the regulation along with ongoing personnel problems in the Fargo office.[359] On January 18, 2002, Heng was fired.[360]

The North Dakota Supreme Court first analyzed whether the trial court correctly dismissed Heng's breach of contract claim against Arrowhealth.[361] Heng alleged that the Arrowhealth employee manual required progressive discipline and prohibited retaliatory termination for reporting suspected health care violations.[362] The court began by stating that where an employee manual expressly states that it does not create a contract with an employee, the employee has employment at-will.[363] The court found that Arrowhealth's employee manual specifically stated employment was at-

351. *Id.* ¶ 3.
352. *Id.*
353. *Id.*
354. *Id.*
355. *Id.* ¶ 4; *see also* N.D. ADMIN. CODE § 105-03-01-02 (2005) (providing that the set up and instruction about the use of medical devices related to respiratory care are prohibited without a license).
356. *Heng*, ¶ 5, 688 N.W.2d at 393.
357. *Id.*
358. *Id.* ¶ 6, 688 N.W.2d at 393-94.
359. *Id.* ¶ 7.
360. *Id.*
361. *Id.* ¶ 11, 688 N.W.2d at 394-95.
362. *Id.*
363. *Id.* ¶ 13, 688 N.W.2d at 395 (citing Olson v. Souris River Telcomms. Coop., Inc., 1997 ND 10, ¶ 16, 558 N.W.2d 333, 336-37).

will, and the manual did not create any contract claims.[364] Additionally, Heng was required to sign an "Employee Corporate Compliance Acknowledgment" when she was hired, which stated that employment was at-will and no contract of employment was created.[365] The court found that after looking at all the employment documentation, there was clear evidence that Heng's employment was at-will, and as a result the trial court did not err in dismissing Heng's breach of contract claim.[366]

The court next looked at Heng's retaliatory discharge claim and whether summary judgment was proper.[367] The court explained that there is an exception to at-will employment when the employee has been terminated and there is a statutory exception.[368] The court pointed to North Dakota's whistle blower statute which prohibits an employer from discharging an employee reporting a violation of the law to an employer in good faith.[369] The statute also allows the employee to bring a civil action against the employer if the employer violates the statute.[370] The court presented three steps for a prima facie case of retaliatory discharge under the statute: "(1) the employee engaged in protected activity; (2) the employer took adverse action against the employee; and (3) the existence of a causal connection between the employee's protected activity and the employer's adverse action."[371] The court found that the second prong of the test was already met as Arrowhealth conceded it took adverse action against Heng when she was fired.[372]

The court then turned to the first prong of the test, whether the employee was engaged in a protected activity.[373] Protected activity includes making a good faith report of a violation of a federal, state, or local regulation or rule, to the employer, governmental body, or a law enforcement official.[374] Arrowhealth argued that since Heng did not report the violations to the company's compliance hotline or to law enforcement or a regulatory agency, she failed to show that she was engaged in a protected

364. *Id.* ¶ 14. The policy manual stated in several locations that the handbook was not a contract, and on the last page of the manual, the employee is required to sign a disclaimer, which includes the fact that employment is at-will. *Id.*

365. *Id.* ¶ 15, 688 N.W.2d at 396.

366. *Id.* ¶ 16.

367. *Id.* ¶ 17, 688 N.W.2d at 396-97.

368. *Id.* ¶ 18, 688 N.W.2d at 397.

369. *Id.* ¶ 19 (citing N.D. CENT. CODE § 34-01-20 (2004)).

370. *Id.* (citing N.D. CENT. CODE § 34-01-20).

371. *Id.* (citing Anderson v. Meyer Broad. Co., 2001 ND 125, ¶ 28, 630 N.W.2d 46, 53).

372. *Id.* ¶ 20.

373. *Id.* ¶ 21.

374. *Id.* (citing N.D. CENT. CODE § 34-01-20).

activity.[375] The court stated that North Dakota's statute allows retaliatory discharge actions where they are based on an employee's report of a violation to the employer, and Heng had reported to her employer her concerns about possible violations numerous times.[376] The court found that Heng did not lack good faith simply because she did not report the violations to outside authorities.[377]

Arrowhealth further alleged that Heng did not report in good faith, as the purpose of reporting was not to expose an illegal practice, pointing out that Heng had stated in her deposition that she was worried about the impact the illegal practice would have on the employees.[378] The court concluded that since Heng repeatedly informed Arrowhealth about the suspected violations and then went to the Board to receive clarification, Heng's concern for the employees was construed as a secondary reason for her reports.[379] The court then stated that it is a question of fact whether an employee has made a report in good faith, summary judgment would not be appropriate if reasonable minds could differ as to whether Heng made the reports for the purpose of protecting employees or reporting an illegality.[380] On the first prong of the test, the court concluded that there was a genuine issue of material fact, and the trial court erred in concluding that Heng established she was engaged in a protected activity.[381]

The court turned to the last prong of the test, whether there was a causal connection between the protected activity and Heng's termination.[382] The court stated that causation requires more than termination after reporting a violation, but an inference can be made that the action was related to the protected activity where the employee's complaints are directed toward the person who fired the employee.[383] In this case, the court indicated that a fact finder could find causation and reasonable proximity based upon that inference, as Heng had been making the majority of her complaints to the individual who fired her, and on the day Heng was terminated, she had made her last report by telephone.[384] Furthermore, an inference can also be drawn where the individual who fires the employee

375. *Id.*
376. *Id.* ¶ 22, 688 N.W.2d at 398.
377. *Id.*
378. *Id.* ¶ 23.
379. *Id.* ¶ 25.
380. *Id.* ¶ 26.
381. *Id.*
382. *Id.* ¶ 27, 688 N.W.2d at 398-99.
383. *Id.* ¶ 28, 688 N.W.2d at 399 (citing Anderson v. Meyer Broad. Co., 2001 ND 125, ¶ 35, 630 N.W.2d 46, 55).
384. *Id.* ¶ 29.

was involved in the reported activity, which also occurred in Heng's situation.[385] The court noted other factors that could lead to this inference, as Arrowhealth had not shown any evidence that Blumenshein attempted to discover whether conditions had improved in the Fargo office before firing Heng.[386] Blumenshein also did not follow Arrowhealth's progressive discipline policy when terminating Heng's employment.[387] The court stated that considering these factors together, a genuine issue of material fact existed, as a fact finder could reasonably draw an inference under the causation prong.[388] Additionally, the court determined that the trial court erred when it found that strong factors and strong causal connectors existed, but still granted summary judgment to Arrowhealth.[389]

Finally, Arrowhealth argued that even if Heng had established a prima facie case for retaliatory discharge, Arrowhealth carried its burden of persuasion by showing a legitimate reason for firing Heng not related to retaliation.[390] However, the court determined that burden shifting is not required at the summary judgment stage, but at the trial stage, and Arrowhealth's argument did not convince the court to affirm summary judgment.[391] The court concluded, based on an analysis of all the issues, that the trial court erred when it granted summary judgment on the retaliatory discharge claim along with attorney's fees for Arrowhealth, but the breach of contract dismissal was proper.[392]

FAMILY LAW—CHILD CUSTODY

KOSTRZEWSKI V. FRISINGER

In *Kostrzewski v. Frisinger*,[393] Shawn Kostrzewski appealed the district court's refusal to grant his motion to dismiss and objection to the registration of a judgment from a Minnesota district court that established custody of his child with Amy Frisinger.[394] The North Dakota Supreme Court affirmed the district court's confirmation of the registration of the Minnesota child custody judgment, but vacated the portion of the trial

385. *Id.* ¶ 30.
386. *Id.* ¶ 31, 688 N.W.2d at 399-400.
387. *Id.* at 399.
388. *Id.* ¶ 32, 688 N.W.2d at 400.
389. *Id.* ¶ 34.
390. *Id.* ¶ 35.
391. *Id.* ¶ 37, 688 N.W.2d at 401.
392. *Id.* ¶ 38.
393. 2004 ND 108, 680 N.W.2d 271.
394. *Frisinger*, ¶ 1, 680 N.W.2d at 272.

court's order that established it had jurisdiction under North Dakota Century Code section 14-14.1-14 to modify the judgment.[395]

Shawn Kostrzewski and Amy Frisinger were never married, but conceived a child that was born on November 5, 1999.[396] In March 2001, Ms. Frisinger married another man and moved to Fargo, North Dakota.[397] In April 2001, Mr. Kostrzewski initiated the child custody determination in Minnesota and also sought custody of the minor child.[398] The Minnesota district court entered judgment confirming Mr. Kostrzewski as the child's father, establishing a visitation schedule, and granting Ms. Frisinger physical custody of the child.[399]

Subsequent to the entry of the judgment, Ms. Frisinger moved to Burleigh County, North Dakota.[400] Ms. Frisinger "filed the Minnesota judgment with the Burleigh County District Court" and notified Mr. Kostrzewski of the filing.[401] Mr. Kostrzewski contested the filing and brought a motion to dismiss.[402] The trial court determined that it "had jurisdiction pursuant to N.D.C.C. § 14-14.1-14," rejected Mr. Kostrzewski's motion to dismiss for lack of jurisdiction, and "denied his objection to the confirmation of" the Minnesota judgment.[403] Mr. Kostrzewski thereafter appealed to the North Dakota Supreme Court.[404]

While the court conceded that the order Mr. Kostrzewski was appealing would traditionally be a non-appealable interlocutory order, the court concluded that, pursuant to North Dakota Century Code section 28-27-02(5), this order was appealable because it decided the merits of an action.[405] Additionally, the court pointed out that it will consider the substance of a motion rather than what the motion is actually entitled.[406] While Mr. Kostrzewski's motion was labeled a "motion to dismiss," it objected to the registration of the Minnesota child custody judgment, which is appealable under North Dakota Century Code section 14-14.1-25(4).[407]

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395. *Id.*
396. *Id.* ¶ 2.
397. *Id.*
398. *Id.* ¶ 3.
399. *Id.*
400. *Id.* ¶ 4.
401. *Id.* ¶ 6.
402. *Id.*
403. *Id.*
404. *Id.* ¶ 7.
405. *Id.* ¶¶ 8, 10, 680 N.W.2d at 273.
406. *Id.* ¶ 10.
407. *Id.*

On appeal, Mr. Kostrzewski argued that the North Dakota trial court did not have the jurisdictional authority to determine the visitation issues, and therefore the Minnesota judgment could not be registered in Burleigh County.[408] According to North Dakota Century Code section 14-14.1-25(4), a court shall confirm a registered order unless it is established by a person contesting such registration that the issuing court "did not have jurisdiction"; the "child custody determination . . . has been vacated, stayed, or modified by a court with jurisdiction to do so"; or the "person contesting the registration" was not given effective notice.[409] The court reasoned that Mr. Kostrzewski's jurisdictional argument did not fit into any of the three grounds upon which he could contest the judgment.[410]

Additionally, the court noted that Ms. Frisinger only requested the registration of the Minnesota judgment, not its enforcement.[411] This limited the authority of the trial court's jurisdiction only to the validity of the Minnesota judgment.[412] According to the court, the trial court erred when it determined that the North Dakota courts had jurisdiction to modify the child custody judgment from Minnesota.[413]

The North Dakota Supreme Court affirmed the portion of the trial court's order confirming the registration of the Minnesota child custody judgment.[414] However, the court held that the trial court exceeded its authority procedurally and substantively when it determined that it had jurisdiction pursuant to North Dakota Century Code section 14-14.1-14, and vacated that portion of the order.[415]

FAMILY LAW—CHILD SUPPORT—PATERNITY

RYDBERG V. RYDBERG

Diane Rydberg gave birth to a child on March 9, 1992.[416] The next day, Andrew Rydberg acknowledged in writing that he was the child's father.[417] On July 22, 1994, Diane and Andrew Rydberg were married and subsequently separated in April 2002.[418] The Ward County Social Service

408. *Id.* ¶ 16, 680 N.W.2d at 274.
409. *Id.* ¶ 15 (citing N.D. CENT. CODE § 14-14.1-25(4) (2004)).
410. *Id.* ¶ 16.
411. *Id.* ¶ 17.
412. *Id.*
413. *Id.*
414. *Id.* ¶ 18, 680 N.W.2d at 274-75.
415. *Id.* at 275.
416. Rydberg v. Rydberg, 2004 ND 73, ¶ 2, 678 N.W.2d 534, 535.
417. *Id.*
418. *Id.*

Board (the Board) brought an action for child support against Andrew Rydberg in May 2002.[419] After the Board initiated an action for child support, Andrew Rydberg claimed that he was not the child's biological father and requested that the case be dismissed.[420] Furthermore, if the Board did not dismiss the case, Andrew Rydberg indicated he would request genetic testing to prove that he was not the father of Diane Rydberg's child.[421] On October 18, 2002, in response to Andrew Rydberg's request for genetic testing, the district court ordered Diane Rydberg, Andrew Rydberg, and the child to submit to genetic testing.[422] The DNA testing confirmed that Andrew Rydberg was not the child's biological father, and based on the DNA test results, the district court dismissed Diane Rydberg's action for child support.[423] The Board made a motion to reconsider the dismissal, but the district court reiterated that the DNA evidence clearly indicated Andrew Rydberg was not the child's father.[424]

The Board maintained that Andrew Rydberg was the presumed father of the child and had failed to rebut the presumption.[425] The Board subsequently made a motion to alter or amend the district court's judgment under North Dakota Rule of Civil Procedure 59(j).[426] The Board maintained that section 14-17-04 of the North Dakota Century Code created a presumption of paternity for Andrew Rydberg.[427] The Board asserted that genetic testing alone should not rebut the presumption of paternity and maintained that

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419. *Id.* The court pointed out that for purposes of establishing paternity and securing repayment of benefits under North Dakota Century Code section 14-09-09.26, the Board is a real party in interest. *Id.*

420. *Id.*

421. *Id.*

422. *Id.*

423. *Id.*

424. *Id.*

425. *Id.* ¶ 4.

426. *Id.* ¶ 6, 678 N.W.2d at 536. In response, Andrew Rydberg argued that the Board's appeal should be limited to those issues raised in the motion to alter or amend the judgment. *Id.* The North Dakota Supreme Court pointed out that the issue of presumption of paternity was raised in the district court during the hearing for genetic testing, and therefore the issue of presumption could be raised on appeal. *Id.* ¶¶ 5-6.

427. *Id.* ¶¶ 7-8 (citing N.D. CENT. CODE § 14-17-04(1) (2004) (repealed 2005)). Editor's Note: The North Dakota Legislature amended the Uniform Paternity Act provisions in 2005, and moved entire Act from chapter 14-17 to chapter 14-20. North Dakota Century Code section 14-17-04(1)(e) provided in part, "A man is presumed to be the biological father of a child if . . . the man acknowledges the man's paternity of the child in a writing filed with the division of vital statistics of the state department of health . . . ." North Dakota Century Code section 14-17-04(1)(c)(1) provided, "A man is presumed to be the biological father if . . . [a]fter a child's birth, that man and the child's biological mother . . . marry each other . . . ." North Dakota Century Code section 14-17-04(1)(d) provided, "A man is presumed to be the biological father of a child if . . . while the child is under the age of majority, the man receives the child into the man's home and openly holds out the child as the man's biological child."

paternity could not be rebutted in this case because the applicable statute of limitations to rebut the presumption of paternity had run.[428]

The court rejected the Board's argument that the statute of limitations precluded Andrew Rydberg from raising nonpaternity as a defense in this child support action.[429] In addition, the court noted that the North Dakota statute of the Uniform Parentage Act (UPA) permits an assertion of the nonexistence of the father-child relationship after five years have passed.[430] The court pointed out that North Dakota makes a distinction between bringing an action and asserting a defense pursuant to section 14-17-05(1)(b) of the North Dakota Century Code.[431] The court looked at other states that have adopted the UPA and noted that only a few states addressed the distinction between bringing an action to determine the existence or nonexistence of the father-child relationship, and asserting the nonexistence of this relationship as a defense after the five years have passed.[432]

The court reexamined *Interest of K.B.*[433] to determine whether that ruling "might set up a situation in which no other legal father could be established because of the statute of limitations for an action to determine a father-child relationship."[434] The court concluded that where there is a presumption of paternity, an action to establish a father-child relationship is not completely barred by a statute of limitations.[435] The court interpreted the statute of limitations in North Dakota Century Code section 14-17-05 as

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428. *See Rydberg*, ¶ 11, 678 N.W.2d at 537 (referring to the statutory time frame for bringing an action to rebut paternity). North Dakota Century Code section 14-17-05(1)(b) provided that a party may bring an action "[f]or the purpose of declaring the nonexistence of the [presumed] father and child relationship . . . only if the action is brought within a reasonable time after obtaining knowledge of relevant facts, but in no event later than five years after the child's birth."

429. *See Rydberg*, ¶¶ 12-14, 678 N.W.2d at 537-38 (noting that N.D. CENT. CODE § 14-17-05(2) permits an action to determine "the existence or nonexistence of the father and child relationship" to be brought at any time).

430. *Id.* ¶ 13, 678 N.W.2d at 537 (citing Interest of K.B., 490 N.W.2d 715, 717 (N.D. 1992)). Under North Dakota Century Code section 14-17-05(1)(b) and Uniform Parentage Act section 6(a)(2), "nonexistence of the father and child relationship can be asserted as a defense after the five years have passed." *Rydberg*, ¶ 13, 678 N.W.2d at 537.

431. *Rydberg*, ¶ 14, 678 N.W.2d at 537-38.

432. *Id.* at 538. Alabama does not have a statute of limitations to claim the nonexistence of paternity; even if a man is presumed to be the father, he can claim the nonexistence of paternity at any time. *Id.* (citing J.N.H. v. N.T.H., 705 So. 2d 448, 452 (Ala. Civ. App. 1997)). In contrast, Missouri courts have held that a defense of nonpaternity is foreclosed by the presumed father. *Id.* (citing Mo. Div. of Child Support Enforcement v. T.J., 981 S.W.2d 149, 150 (Mo. 1998)). Minnesota has interpreted the UPA "to allow a presumed father to challenge the presumption of paternity in an action brought more than five years after the child's birth." *Id.* (citing *Interest of K.B.*, 490 N.W.2d at 717). Like Minnesota, Colorado has established that the right to claim nonpaternity as a defense is not restricted by a statute of limitations. *Id.* (citing Interest of R.T.L., 780 P.2d 508, 514 (Colo. 1989)).

433. 490 N.W.2d 715 (N.D. 1992).

434. *Rydberg*, ¶ 16, 678 N.W.2d at 538.

435. *Id.* ¶ 17.

a bar only to the bringing of a paternity action.[436] Therefore, the court concluded that Andrew Rydberg was permitted to raise nonpaternity as a defense to the Board's child support action.[437]

The Board contended that genetic tests are inadequate to rebut the presumption of paternity provided in section 14-17-04(2) of the North Dakota Century Code.[438] In addition, the Board argued that before a presumption of paternity can be rebutted, section 14-17-04(2) requires an adjudication of paternity by another man.[439] The court acknowledged that one UPA state requires a court decree establishing paternity of the child by another man before a presumption of paternity may be rebutted.[440] However, the court pointed out that other UPA states have recognized that genetic test results can provide clear and convincing evidence to rebut the presumption of paternity.[441] It was apparent to the court that these states do not require an adjudication of another man's paternity.[442]

The court looked at the legislative intent of the North Dakota statute and determined that the ordinary meaning of the statutory language permitted a rebuttal of the presumption of paternity by clear and convincing evidence.[443] Had the legislature intended to limit actions to rebut a presumption of paternity to only those cases where another man's paternity had been established, the court reasoned the legislature "would not have included the clause stating that a presumption of paternity can be rebutted by clear and convincing evidence."[444]

Relying on California case law, the Board argued that other factors should be considered, and that clear and convincing evidence, such as genetic test results, would not absolutely rebut the presumption of paternity

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436. *Id.* ¶¶ 16-17.

437. *Id.* ¶ 18, 678 N.W.2d at 538-39.

438. *Id.* ¶ 19, 678 N.W.2d at 539; *see also* N.D. CENT. CODE § 14-17-04(2) (2004) (repealed 2005). This section provided:

> A presumption under this section may be rebutted in an appropriate action only by clear and convincing evidence. If two or more presumptions arise which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls. The presumption is rebutted by a court decree establishing paternity of the child by another man.

Id.

439. *Rydberg*, ¶ 20, 678 N.W.2d at 539.

440. *Id.* ¶ 21.

441. *See id.* ¶ 22 (citing case law from several states which have adopted the UPA and permitted genetic evidence to rebut the presumption of paternity).

442. *Id.*

443. *Id.* ¶ 23.

444. *Id.*

in every case.[445] The court pointed out that, in contrast to the present child support case, the California cases cited by the Board were custody cases and involved situations where there was a possibility of displacing a child's relationship with a committed father for a relationship with a potentially unknown person.[446] The court also noted that section 14-17-02 of the North Dakota Century Code required "an appropriate legal demand of one's rights, not the appropriate circumstances under which the demand of rights is asserted."[447] Concluding that the language of section 14-17-02 was unambiguous, the court rejected the Board's argument that the presumption may be rebutted by clear and convincing evidence only in an appropriate action, based on a consideration of the surrounding circumstances.[448]

The Board also argued that the lower court should have considered the best interests of the child.[449] However, the Board based this argument on the existence of a competing presumption of paternity and had previously conceded at oral argument that there was no such competing presumption.[450] The court concluded that "genetic tests [were] enough to rebut the presumption of paternity in N.D.C.C. 14-17-04(2)."[451]

Finally, the Board argued that under section 14-17-08 of the North Dakota Century Code, the child should have been represented by a guardian ad litem during the hearing on genetic testing.[452] The court acknowledged that the child in this case was not represented by a parent, and a guardian ad litem should have been appointed.[453] However, the court examined the record of the hearing and determined that the Board was "clearly representing the child's [best] interests."[454]

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445. *Id.* ¶ 24, 678 N.W.2d at 540. The Board based its argument on the California court's requirement of a competing paternity claim in an action to rebut the presumption of paternity. *Id.* ¶¶ 25-27. Absent a competing action to establish paternity, the California court was concerned that a rebuttal of the presumption of paternity would leave the child without a father. *Id.* ¶ 25.

446. *Id.* ¶ 27.

447. *Id.* ¶ 26. The court interpreted a similar statutory reference to mean "that when an appropriate action [meaning a legal demand of one's rights] has been brought, a presumption can be rebutted by clear and convincing evidence." *Id.* (citing LC v. TL, 870 P.2d 374, 379 (Wyo. 1994)).

448. *Id.*

449. *Id.* ¶ 28.

450. *Id.*

451. *Id.* ¶ 29.

452. *Id.* ¶ 30, 678 N.W.2d at 540-41. The statute stated in part, "A child who is a minor must be represented by the child's parent whose parentage has been established . . . or a guardian ad litem appointed by the court. The court may appoint the director of the county social service board as guardian ad litem for the child." N.D. CENT. CODE § 14-17-08 (2004) (repealed 2005).

453. *Rydberg*, ¶ 31, 678 N.W.2d at 541.

454. *Id.* The court concluded that the district court's failure to appoint a guardian ad litem did not constitute reversible error. *Id.*

Based on the circumstances presented in this child support action, a majority of the court held that the best interests of the child were represented, and that Andrew Rydberg was not precluded from raising nonpaternity as a defense based on the results of genetic testing.[455] The North Dakota Supreme Court affirmed the lower court's dismissal.[456]

Justice Kapsner dissented,[457] and Justice Maring agreed with part III of Justice Kapsner's dissent.[458] In her dissent, Justice Kapsner pointed out that shortly after the child was born, Andrew Rydberg signed an acknowledgment of paternity.[459] In addition, Andrew Rydberg married the child's mother, held himself out to be the child's father for ten years, and accepted the child into his home.[460] Andrew Rydberg's paternity challenge and subsequent request for genetic testing were motivated by his desire to avoid child support payments.[461] Justice Kapsner concluded that the statute of limitations to contest paternity had passed, and that the district court erred when it permitted Rydberg to bring a paternity action.[462] In the alternative, if the statute of limitations did not present an absolute bar to Rydberg's nonpaternity defense, Justice Kapsner asserted that the child was entitled to the protections of the UPA, as codified at North Dakota Century Code chapter 14-17.[463] Finally, Justice Kapsner contended that the district court erred when it ordered the genetic tests and subsequently determined paternity without considering if equitable estoppel would bar Rydberg from asserting nonpaternity.[464]

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455. *Id.* ¶ 32.

456. *Id.*

457. *Id.* ¶ 34 (Kapsner, J., dissenting).

458. *Id.* ¶ 53, 678 N.W.2d at 547 (Maring, J., dissenting). Justice Maring contended that before the district court ruled on the issue of whether the results of genetic testing were determinative of paternity, it should not only have appointed a guardian ad litem for the child, but also considered the best interests of the child. *Id.*

459. *Id.* ¶ 34, 678 N.W.2d at 541 (Kapsner, J., dissenting).

460. *Id.*

461. *Id.*

462. *Id.* The five-year statute of limitations for assertion of nonpaternity provides protection to a child who has been acknowledged by a father. *Id.* ¶ 39, 678 N.W.2d at 543. Justice Kapsner contended that the majority position negated this protection and frustrated legislative intent. *Id.*

463. *See id.* ¶ 34, 678 N.W.2d at 541 (stating that North Dakota law required the appointment of a guardian ad litem).

464. *Id.*

FAMILY LAW—DEPENDENT, NEGLECTED, AND DELINQUENT CHILDREN—DEPRIVATION, NEGLECT, OR ABUSE

IN THE INTEREST OF T.J.L.

A mother (Linda) and father (Bob) appealed from a judgment terminating parental rights to their daughter (Tracy).[465] At the time of the termination proceedings, Linda was 31 years old.[466] She had been diagnosed with "major depression, intermittent explosive disorder, obsessive compulsive disorder, and borderline personality."[467] At the same time, Bob was 25 years old.[468] He suffered a traumatic brain injury as a child and had been diagnosed with mental retardation, seizure disorder, and encephalopathy, and functioned at the level of a four- to five-year-old child.[469] Both Linda and Bob have histories of violent behavior.[470]

When Tracy was born, she went from the hospital directly into foster care, and Linda and Bob were given visitation rights.[471] They were referred to the "Nurturing Program" to learn parenting skills.[472] During these parenting sessions, the couple did not know how to care for Tracy and did not know what to do when she would start to cry.[473] Although Tracy had an upper respiratory condition, Linda and Bob smoked in her presence.[474] The smoke created constant respiratory problems for Tracy.[475]

The court found that the evidence established that "Social Services attempted to work with Linda and Bob to improve their homemaking and parenting skills; [however], the couple avoided offered services and adopted an adversarial relationship with the service providers."[476]

The court stated that termination of parental rights requires satisfaction of a three-prong test.[477] First, the child must be a deprived child.[478] Second, the conditions and causes of the deprivation must be likely to

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465. In the Interest of T.J.L., 2004 ND 142, ¶ 1, 682 N.W.2d 735, 736.
466. *Id.* ¶ 5.
467. *Id.*
468. *Id.* at 737.
469. *Id.*
470. *Id.*
471. *Id.* ¶ 6.
472. *Id.* ¶ 7.
473. *Id.*
474. *Id.*
475. *Id.*
476. *Id.* ¶ 10.
477. *Id.* ¶ 2, 682 N.W.2d at 736.
478. *Id.*

continue.[479] Third, as a result of the first two prongs, the child is suffering or will likely suffer serious physical, mental, or emotional harm.[480] The party petitioning for termination must prove each factor by clear and convincing evidence.[481]

The court held that North Dakota Rule of Civil Procedure 52(a) provides that findings of facts in juvenile matters shall not be set aside unless clearly erroneous.[482] A finding of fact is clearly erroneous if there is no evidence to support it, if it is clear that a mistake has been made, or if the finding is made because of an erroneous view of the law.[483]

The court went on to state that when efforts have been made over an extensive period of time to overcome a parent's inabilities to effectively parent, courts cannot allow the child to remain in an intermediate status.[484] The court ultimately held that the district court's findings were not clearly erroneous.[485] The district court was not clearly erroneous in finding that: (1) there was clear and convincing evidence that Tracy was deprived; (2) the causes and conditions of her deprivation were likely to continue; and (3) as a result of the continued deprivation, she would likely suffer serious physical, mental, or emotional harm if Linda and Bob's parental rights were not terminated.[486]

FAMILY LAW—DEPENDENT, NEGLECTED, AND DELINQUENT CHILDREN—DEPRIVATION, NEGLECT, OR ABUSE

IN THE INTEREST OF T.T.

A mother appealed a juvenile court ruling that her ten-year-old child was deprived.[487] The juvenile court placed legal custody of the child with the Department of Human Services and physical custody with the mother.[488] The North Dakota Supreme Court affirmed the juvenile court's decision, holding that the court's finding that there was clear and convincing evidence that the child was deprived was not clearly erroneous.[489]

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479. *Id.*
480. *Id.*
481. *Id.*
482. *Id.*
483. *Id.*
484. *Id.* ¶ 11, 682 N.W.2d at 738.
485. *Id.*
486. *Id.*
487. In the Interest of T.T., 2004 ND 138, ¶ 1, 681 N.W.2d 779, 780.
488. *Id.*
489. *Id.*

The State had filed a petition alleging that this child was deprived, with which the juvenile court agreed.[490] The court ordered the child to be "placed in the care, custody, and control of the Department of Human Services," allowing "the child to remain with his mother unless the Department deemed that it was necessary to remove the child from the mother's home."[491]

On appeal, the mother first argued "that errors of law during [the] proceeding affected the outcome of the case," and secondly, that the proceeding affected "her and the child's constitutional rights."[492] The court took each argument in turn.[493]

First, the mother argued that the time lapse between the filing of the deprivation petition and the date of the hearing violated the thirty-day requirement of North Dakota Century Code section 27-20-22.[494] The court found that because the record did not show the mother had previously raised this issue in the juvenile court, she could not raise it for the first time on appeal.[495] The court noted that even if the mother had previously raised the issue, the delay was caused in part by demands for a change of judge by the mother and the father.[496] Therefore, the court concluded that the juvenile court had good cause for the delay.[497]

Next, the mother argued that the "juvenile court erred by allowing issues from a divorce-related custody proceeding to be mixed with issues about deprivation."[498] However, there were no citations to the record establishing the mixture of divorce issues and deprivation issues.[499] According to the court, the record demonstrated that the custody and deprivation proceedings were conducted separately.[500] The court also rejected the mother's argument that the district court erred in admitting a memorandum decision in the divorce proceeding into evidence, and her claim that the father improperly participated in the deprivation proceeding as a de facto co-counsel for the State.[501] The court explained that the mother could not complain about this issue on appeal because she "agreed

490. *Id.* ¶¶ 2-3, 681 N.W.2d at 781.
491. *Id.* ¶ 3.
492. *Id.* ¶ 6.
493. *Id.* ¶¶ 7-26, 681 N.W.2d at 781-86.
494. *Id.* ¶ 7, 681 N.W.2d at 781-82.
495. *Id.* ¶ 8, 681 N.W.2d at 782.
496. *Id.*
497. *Id.*
498. *Id.* ¶ 9.
499. *Id.* ¶ 11.
500. *Id.*
501. *Id.* ¶¶ 12-13, 681 N.W.2d at 783.

to the procedure for allowing the father to call a witness during the State's case-in-chief."[502] The court ultimately determined that there was no evidence "to support the mother's claim that the juvenile court improperly mixed" divorce and deprivation proceedings.[503]

The mother also argued that the juvenile court erred when it admitted the testimony of the former guardian ad litem and when it "denied her constitutional right to custody and companionship of her child."[504] Again, the court held that because the mother did not raise either issue at the juvenile court, she would not be allowed to raise them on appeal for the first time.[505] Additionally, the court stated that the mother's constitutional claims were meritless.[506]

The mother also argued that the juvenile court erred when it admitted testimony by a doctor regarding parental alienation syndrome, because the syndrome is not a recognized scientific term and does not apply when there is domestic violence.[507] Again, the court found that in the juvenile court proceedings, the mother did not object to the testimony on the basis that the term was not recognized in the scientific community, and therefore could not raise the issue for the first time on appeal.[508]

Next, the mother argued that "she should have been allowed to cross-examine adverse witnesses."[509] The court found that the mother made conclusory assertions without citation to any relevant authorities, and thus the mother's argument on this issue was without merit.[510]

The mother argued error by the juvenile court in refusing to admit "into evidence records of the supervised exchange center . . . involved with supervising custodial exchanges between the mother and the father."[511] The court stated that a lower court decision to admit or exclude evidence on the grounds of relevance will not be reversed unless the court abused its discretion, and concluded that the juvenile court did not abuse its discretion.[512]

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502. *Id.*
503. *Id.* ¶ 14.
504. *Id.* ¶¶ 15-16.
505. *Id.* at 783-84.
506. *Id.* ¶ 16, 681 N.W.2d at 784.
507. *Id.* ¶ 17.
508. *Id.*
509. *Id.* ¶ 18.
510. *Id.* at 785.
511. *Id.* ¶¶ 21-22.
512. *Id.*

Finally, the mother argued that the State failed to prove deprivation by clear and convincing evidence.[513] She also claimed that the juvenile court failed to identify the facts upon which it rested its ultimate conclusion.[514] The court found that the juvenile court's findings "adequately explained the basis" for its ruling.[515] The court concluded that the juvenile court's finding of clear and convincing evidence was not clearly erroneous, and affirmed the juvenile court orders.[516]

FAMILY LAW—DIVORCE—ALIMONY, ALLOWANCES, AND DISPOSITION OF PROPERTY

HILGERS V. HILGERS

In *Hilgers v. Hilgers*,[517] Douglas Hilgers appealed the district court's letter opinion that denied his motion to reconsider, amend, or set aside previous court orders relative to obligations of child and spousal support due to his divorce from Brenda Hilgers.[518] The North Dakota Supreme Court noted that Douglas had appealed a "nonappealable order," but concluded that its review was appropriate under the circumstances of the case.[519] While the court found that the district court had not abused its discretion regarding its refusal to reconsider Douglas's request to be relieved from the order granting spousal support to Brenda, the court did find that the district court abused its discretion when it refused to address the child and spousal support issues which he raised.[520] The court dismissed his appeal and directed the district court to handle the child and spousal support issues raised in his motions.[521]

Douglas and Brenda Hilgers were married in 1980.[522] In September 1998, Brenda was granted a divorce from Douglas.[523] Four children were born over the course of their marriage, with two children still being of minor age at the time of the divorce.[524] The divorce judgment granted

513. *Id.* ¶ 23.
514. *Id.*
515. *Id.* ¶ 25.
516. *Id.* ¶¶ 25-26, 630 N.W.2d at 785-86.
517. 2004 ND 95, 679 N.W.2d 447.
518. *Hilgers*, ¶ 1, 679 N.W.2d at 448-49.
519. *Id.* at 449.
520. *Id.*
521. *Id.*
522. *Id.* ¶ 2.
523. *Id.*
524. *Id.*

custody of the minor children to Brenda and ordered Douglas to pay child and spousal support.[525]

Douglas thereafter filed a number of motions with the district court.[526] Most notably, on March 28, 2003, Douglas filed a motion for a temporary change of custody of his minor son.[527] On May 13, 2003, the district court granted Douglas custody of his minor son, discontinued his child support obligation to Brenda, and ordered her to pay child support.[528] The court also added a letter with the order that the amount of child support could be increased depending on any future increase in Brenda's income.[529]

Subsequent to the change of custody, Douglas filed numerous motions regarding the termination of his spousal support obligations, requests for Brenda to pay him spousal support, and the failure of Brenda to pay any child support since the change of custody of their minor son.[530] Included in these motions was a motion dated July 7, 2003, that requested the court to amend or set aside the "Orders of the Court."[531] During this time, Brenda relocated to Bottineau County.[532] The Ward County District Court ordered that a certified copy of the child and spousal support order be filed with the Bottineau County Clerk of Court, and any inquiries the parties had should be directed there.[533] Because Douglas had not had any response to his motions, he sent a letter dated July 14, 2003, to the Ward County District Court inquiring into whether his motions were being reviewed, and also to determine if he could request a change of venue.[534] On August 21, 2003, the district court issued Douglas a letter stating that the case was still venued in Ward County, but it did not address the child or spousal support issues he had raised in his motions.[535]

On September 2, 2003, Douglas filed an appeal regarding the denial of reconsideration of the spousal support orders.[536] Through a lengthy discussion, the North Dakota Supreme Court concluded that, pursuant to North Dakota Rule of Appellate Procedure 4(a)(1), Douglas had only timely appealed the opinion letter dated August 21, 2003, which responded to his

525. *Id.*
526. *Id.* ¶ 3.
527. *Id.* ¶ 4.
528. *Id.* at 450.
529. *Id.*
530. *Id.* ¶¶ 5-10, 679 N.W.2d at 450-51.
531. *Id.* ¶ 8, 679 N.W.2d at 450.
532. *Id.* ¶ 7.
533. *Id.*
534. *Id.* ¶ 9, 679 N.W.2d at 451.
535. *Id.*
536. *Id.* ¶¶ 9-11.

motion to set aside or amend the previous orders of the court.[537] The court noted that, unless an order or judgment is entered after the opinion letter is issued, an opinion letter is not appealable under North Dakota Century Code section 28-27-02.[538] However, the court decided to invoke its supervisory authority because the district court's failure to consider any of Douglas's motions regarding child and spousal support left him with no alternate remedy.[539]

A decision by a district court to deny a motion to alter, amend, or reconsider an order or judgment will not be overturned unless the district court abuses its discretion.[540] In his appellate brief, Douglas asserted that the district court erred in five of its determinations.[541] First, he argued that the district court erred in not granting him relief from the spousal order contained in the divorce judgment.[542] Douglas again relied on his health problems during the default divorce proceedings as the justification for relief.[543] The North Dakota Supreme Court found that because he did not introduce any new evidence or arguments, the district court did not abuse its discretion when it did not reconsider the motion.[544]

Douglas also asserted that the district court erred when it did not order Brenda to pay spousal support or establish a trust fund for their minor son.[545] The North Dakota Supreme Court found that, because the district court did not initially award Douglas spousal support and did not reserve its jurisdiction, the district court lacked the jurisdictional authority to award him spousal support.[546] Additionally, the court concluded that because Douglas did not raise the trust fund issue at the district court level, he could not do so on appeal.[547]

Douglas also asserted that the district court erred when it did not consider his motions regarding Brenda's child support responsibility and arrearages, and modification of his spousal support obligations.[548] The North Dakota Supreme Court agreed.[549] The court reasoned that a court

537. *Id.* ¶¶ 12-13.
538. *Id.* ¶ 15, 679 N.W.2d at 452.
539. *Id.* ¶¶ 16-17, 679 N.W.2d at 452-53.
540. *Id.* ¶ 18, 679 N.W.2d at 453.
541. *Id.* ¶ 19.
542. *Id.*
543. *Id.* ¶ 20.
544. *Id.*
545. *Id.* ¶ 21.
546. *Id.*
547. *Id.*
548. *Id.* ¶ 22.
549. *Id.*

errs when it fails to determine an obligor's child support amount in accordance with the Child Support Guidelines.[550] The court also noted that spousal support may be modified when a material change of circumstances is proven.[551] Because Douglas requested that Brenda's child support amount be determined, and also asserted that his financial circumstances changed, which would satisfy a change in circumstances and therefore justify modification of spousal support, the issues raised were not frivolous.[552] The court stated that it is an abuse of discretion if a district court does not address non-frivolous issues raised.[553] The North Dakota Supreme Court held that, because the district court did not address Brenda's child support obligation and modification of Douglas's spousal support amount, the district court abused its discretion.[554] The North Dakota Supreme Court dismissed Douglas's appeal and directed the district court to handle the child and spousal support issues raised in his motions.[555]

FAMILY LAW—DIVORCE—PROPERTY DIVISION

STRIEFEL v. STRIEFEL

In *Striefel v. Striefel*,[556] Edward Striefel appealed the trial court's finding that his California Public Employees Retirement System (CalPERS) payments were marital property that could be divided, and that Ann Striefel was entitled to spousal support as a disadvantaged spouse.[557] Ann cross-appealed, alleging the award of only one fourth of Edward's CalPERS payments was clearly erroneous.[558] The North Dakota Supreme Court affirmed the award of spousal support, and reversed and remanded in part regarding the CalPERS award.[559]

Edward and Ann Striefel were married in 1986 and had two children throughout their marriage.[560] Edward worked for the California Department of Corrections from 1987 until he started having problems with hip disease in 1992.[561] In 1993, Edward was placed on disability status and had

550. *Id.* ¶ 23, 679 N.W.2d at 453-54.
551. *Id.* at 454.
552. *Id.* at 453.
553. *Id.* ¶ 25.
554. *Id.*
555. *Id.* ¶ 26.
556. 2004 ND 210, 689 N.W.2d 415.
557. *Striefel*, ¶ 6, 689 N.W.2d at 418.
558. *Id.*
559. *Id.* ¶ 1, 689 N.W.2d at 417.
560. *Id.* ¶ 2. Edward had prior surgery for the condition in 1982. *Id.*
561. *Id.*

been approved for CalPERS disability benefits.[562] The Striefels moved to North Dakota where Edward continued his college education, which was paid for by California workers' compensation funds under a rehabilitation program.[563] After Edward completed school in 1994, he started drawing from his CalPERS benefits, and Ann began working outside of the home.[564] Ann sued for divorce in December 2002 while she was an assistant manager of McDonalds earning $22,254 per year, and Edward was working in the school system for $14,000 per year.[565]

The trial court determined that including Edward's benefits and salary, his income was twice that of Ann's, meaning it would be easier for him to make ends meet.[566] The trial court also included the CalPERS payments as marital property and determined that the payments were part of an early retirement program; as a result, Ann was entitled to one fourth of Edward's future CalPERS benefits.[567] The trial court further concluded that Ann was a disadvantaged spouse but capable of rehabilitation, and the court awarded her spousal support for the next four years.[568]

The North Dakota Supreme Court began its analysis of the issue by stating that if the CalPERS payments were disability benefits, they would not be included in marital property, but if the benefits were part of a pension or retirement, then the payments could be included.[569] The court looked to California law to determine the proper treatment of CalPERS benefits.[570] According to California case law, a determination of the predominant purpose of the benefit is necessary to find the primary objective of that benefit.[571] The North Dakota Supreme Court noted that although California and North Dakota both treat retirement benefits as marital property and disability payments as non-marital property, after retirement age, disability benefits are considered part of marital property.[572] Because of this distinction, the court looked at the time the disability payments were being made to determine the predominant function of the benefit.[573] In Edward's case, the court determined that the trial court erred

562. *Id.*
563. *Id.*
564. *Id.* ¶¶ 2-3.
565. *Id.* ¶ 3.
566. *Id.* ¶ 4.
567. *Id.* at 417-18.
568. *Id.* ¶ 5, 689 N.W.2d at 418.
569. *Id.* ¶ 12, 689 N.W.2d at 420.
570. *Id.* ¶ 11, 689 N.W.2d at 419-20.
571. *Id.* at 419 (citing *In re* Marriage of Stenquist, 582 P.2d 96, 103 (Cal. 1978)).
572. *Id.* ¶ 12, 689 N.W.2d at 420.
573. *Id.*

when it deemed his benefits as retirement benefits, and further stated that the benefits were disability benefits as they were being paid to cover his disability.[574] However, the court noted that when Edward was eligible for retirement, the benefits would be considered retirement benefits and part of marital property.[575] The court reversed the trial court's decision and remanded the case in order to obtain an equitable property division based upon the findings on that issue.[576]

Next, the court analyzed the award of spousal support.[577] The court stated that if a spouse forgoes opportunities as a consequence of a marriage, and if the spouse contributed to the supporting spouse's increased earning capacity while they were married, the spouse has been disadvantaged.[578] The court determined that since Ann supported Edward while he went back to school, cared for their home and children, contributed to Edward's earning capacity, and lost work opportunities, advantages, and the right to retirement benefits, she should be entitled to rehabilitative support.[579] However, even though the determination of rehabilitative spousal support was affirmed, the court noted that the amount might change on remand based upon reconsideration of property division.[580] Finally, the court took a brief look at Ann's cross-appeal.[581] The court stated that the issue need not be addressed, as the benefits had been determined to belong only to Edward and were not part of the marital property.[582]

FAMILY LAW—DIVORCE—SPOUSAL SUPPORT

MEYER V. MEYER

In *Meyer v. Meyer*,[583] Diane Meyer appealed a district court judgment "modifying Timothy Meyer's spousal support obligation from $800 per month to $300 per month."[584] The North Dakota Supreme Court held that the trial court could properly consider the husband's reduction in income in determining whether there had been a material change in circumstances

574. *Id.* ¶ 14, 689 N.W.2d at 421.
575. *Id.*
576. *Id.* ¶ 15.
577. *Id.* ¶ 16.
578. *Id.* (citing Amsbaugh v. Amsbaugh, 2004 ND 11, ¶ 40, 673 N.W.2d 601, 611).
579. *Id.* ¶ 17, 689 N.W.2d at 421-22.
580. *Id.*
581. *Id.* ¶ 18, 689 N.W.2d at 422.
582. *Id.* ¶ 19.
583. 2004 ND 89, 679 N.W.2d 273.
584. *Meyer*, ¶ 1, 679 N.W.2d at 274-75.

warranting modification of spousal support.[585] The court also determined that the trial court did not fail to give adequate consideration to the fact that the parties stipulated to the original spousal support award.[586] The North Dakota Supreme Court reversed the trial court's modification because it failed to explain the reasons for the reduction from $800 to $300 per month.[587]

Timothy and Diane Meyer were officially divorced in February 1998.[588] Under the original stipulated divorce decree, Timothy was required to pay $800 per month to Diane for ten years.[589] In 1998, Timothy earned $72,000 per year, while Diane was making only $22,000 per year.[590] Five years later, Timothy's employer was sold, and his income was reduced from $79,000 to $50,000 per year.[591] Based on this reduction, Timothy moved for "termination of his spousal support obligation, or in the alternative, a reduction in the amount of support."[592] In a hearing before a judicial referee, the referee recommended that the support obligation be reduced to $300 per month for the remaining term of the agreement.[593] Diane requested a review by the district court, which affirmed the referee's findings.[594] Diane appealed the district court's decision.[595]

Upon review, Diane asserted several arguments.[596] First, she argued that the court's modification of spousal support was clearly erroneous because Timothy's loss of income did not constitute a material change in circumstances.[597] The North Dakota Supreme Court disagreed, finding a material change in circumstances because the 30.6% reduction in Timothy's income constituted a major decrease.[598] The court noted that at the time of

585. *Id.* ¶ 7, 679 N.W.2d at 276.
586. *Id.* ¶ 8.
587. *Id.* ¶ 9.
588. *Id.* ¶ 2, 679 N.W.2d at 275.
589. *Id.*
590. *Id.*
591. *Id.* ¶ 3.
592. *Id.*
593. *Id.*
594. *Id.*
595. *Id.* ¶ 4.
596. *Id.*
597. *Id.*
598. *Id.* ¶ 7, 679 N.W.2d at 276. The court stated that "[a] material change in circumstances means something that substantially affects the parties' financial abilities or needs, and the reasons for changes in income must be examined as well as the extent to which the changes were contemplated by the parties at the time of the initial decree." *Id.* ¶ 5, 679 N.W.2d at 275 (citing Schmalle v. Schmalle, 1998 ND 201, ¶ 12, 586 N.W.2d 677, 681). Furthermore, "[a] contemplated change is one taken into consideration by the district court in fashioning its original decree." *Id.*

the original decree, the difference between Timothy's and Diane's incomes was $50,000, while the current difference was only $18,000.[599]

Second, Diane asserted that the reduction in Timothy's income was both contemplated and voluntary, and therefore his reduction in salary should not be considered in finding a material change in circumstances.[600] The court found that while the parties contemplated that Timothy might voluntarily change jobs, thus reducing his income, neither party contemplated that Timothy's income would be reduced involuntarily as the result of the sale of his employer.[601] The court stated:

> More importantly, the parties did not contemplate the extent to which Timothy Meyer's income has ultimately been reduced by the sale of his employer. The change was not voluntarily incurred by Timothy Meyer, nor was it contemplated by the parties or considered by the district court in fashioning the original decree.[602]

Thus, the court held that the trial court did not err in considering Timothy's reduction in income as relevant to its finding that a material change in circumstances existed.[603]

Finally, Diane asserted that the trial court did not adequately consider that the original decree was based upon the stipulation of the parties, and therefore should not be changed.[604] The court noted that although spousal support decrees based on stipulation of the parties are favored and should be changed only "with great reluctance," such a decree can be modified upon a showing of a material change in circumstances.[605] The court rejected Diane's argument because there was no evidence that the trial court failed to adequately consider the parties' original stipulated decree.[606] The trial court properly considered the reduction in income and determined that a material change in circumstances existed.[607] Therefore, the court held that the trial court's finding was not clearly erroneous.[608]

Even though it rejected all of Diane's arguments, the North Dakota Supreme Court reversed the trial court's order modifying the spousal

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599. *Id.* ¶ 6, 679 N.W.2d at 275-76. In 1998, Timothy's income was $72,000 and Diane's income was $22,000. *Id.* However, following the divorce Diane's income had increased to $32,000 while Timothy's income had decreased to $50,000. *Id.* at 276.

600. *Id.* ¶ 7.

601. *Id.*

602. *Id.*

603. *Id.*

604. *Id.* ¶ 8.

605. *Id.* (quoting Toni v. Toni, 2001 ND 193, ¶ 11, 636 N.W.2d 396, 400).

606. *Id.*

607. *Id.*

608. *Id.*

support payments because the modification was not properly explained in relation to the reduction in income.[609] The trial court did not provide sufficient analysis on Diane's current need for the support, nor on Timothy's current ability to pay spousal support.[610] Instead, it only concluded that Diane's needs had changed and so had Timothy's ability to pay.[611] Thus, the court could not determine why the support payments were reduced from $800 to $300 per month.[612]

On remand the trial court was ordered to evaluate Timothy's ability to pay and Diane's need for the support, and to award an amount that was "adequately proportional to the reduction in Timothy Meyer's income in light of Diane Meyer's need for support."[613] Finally, the court ordered the trial court to give "sufficient credence" to the fact that the original decree was based upon the stipulation of the parties.[614]

Justice Maring dissented in part and concurred in part.[615] Justice Maring agreed that the order of the trial court must be reversed; however, she disagreed with the majority's reasoning.[616] Justice Maring found no material change in circumstances because "the alleged change of circumstances was contemplated by the parties when they entered into the agreement to settle their spousal support and property division issues and because there is no evidence Timothy Meyer's ability to earn is impaired. . . ."[617] Furthermore, Justice Maring noted that even if Timothy's reduction in income was a change in circumstances, the trial court provided no analysis of whether the change was material because there was no evidence of whether Timothy was able to make the payments.[618] Finally, even if the change were material, Justice Maring would have reversed because the trial court provided no analysis explaining why $300 per month was the appropriate modification of the spousal support payments.[619]

Justice Sandstrom also dissented because he argued that the trial court's order modifying the support payments from $800 to $300 per month should stand.[620] Justice Sandstrom noted that the difference in income

609. *Id.* ¶ 9 (citing Wheeler v. Wheeler, 548 N.W.2d 27, 30 (N.D. 1996)).
610. *Id.* at 277.
611. *Id.*
612. *Id.*
613. *Id.*
614. *Id.*
615. *Id.* ¶ 12 (Maring, J., dissenting).
616. *Id.*
617. *Id.* ¶ 20, 679 N.W.2d at 279.
618. *Id.* ¶¶ 21-23, 679 N.W.2d at 279-80.
619. *Id.* ¶ 24, 679 N.W.2d at 280.
620. *Id.* ¶¶ 28-29, 679 N.W.2d at 280-81 (Sandstrom, J., dissenting).

between the two parties had narrowed by 64% according to the record.[621] He then noted that the trial court reduced the monthly payment by 62.5%.[622] Believing that the judgment should have been affirmed, Justice Sandstrom concluded, "The math speaks for itself."[623]

FAMILY LAW—INFANTS—DEPENDENT, NEGLECTED, AND DELINQUENT CHILDREN

IN RE T.F. AND T.F.

In *In re T.F. and T.F.*,[624] J.F. ("John") appealed the termination of "his parental rights to his six-year-old son, T.C.F. ("Ted"), and his four-year-old daughter, T.M.F. ("Tina")."[625] The North Dakota Supreme Court held that there was clear and convincing evidence justifying the termination of John's parental rights.[626] The court further concluded that there was evidence beyond a reasonable doubt that the children would likely suffer serious emotional or physical harm if they stayed in John's care.[627]

In January 2001, Traill County Social Services took Ted and Tina into protective custody due to alleged physical abuse by John towards Ted.[628] In May 2001, John pled guilty to charges of aggravated assault involving a ten-year-old girl, although John disputed the charges.[629] On February 26, 2002, John retained physical custody of the children.[630] Traill County Social Services required John to secure ongoing employment and to quit using drugs and alcohol.[631] However, John continued to use marijuana and was charged with a DUI after the children were returned to his care.[632] Because of this, John's probation was revoked, and he returned to jail.[633] Ted and Tina were once again removed from John's custody due to his incarceration and placed in the care of an aunt, who then planned to adopt the children upon the termination of their mother and father's parental rights.[634] After the hearing on June 9, 2003, the juvenile court granted the

621. *Id.* ¶ 30, 679 N.W.2d at 281.
622. *Id.*
623. *Id.*
624. 2004 ND 126, 681 N.W.2d 786.
625. *In re T.F. and T.F.*, ¶ 1, 681 N.W.2d at 788.
626. *Id.*
627. *Id.*
628. *Id.* ¶ 2.
629. *Id.* ¶ 3.
630. *Id.* ¶ 4.
631. *Id.*
632. *Id.*
633. *Id.*
634. *Id.*

petition to terminate John's parental rights, finding that the children were in fact deprived, that deprivation was likely to continue, and that the children would "suffer serious physical, mental, moral, or emotional harm" if John's rights were not terminated.[635]

John appealed to the North Dakota Supreme Court, arguing a lack of clear and convincing evidence of past and continuing deprivation.[636] Additionally, John argued that there was insufficient evidence to determine beyond a reasonable doubt that the children would suffer harm if his rights were not terminated.[637] The juvenile court may terminate parental rights if the child is deprived, if the deprivation is likely to continue, and if the child is suffering or is likely to suffer in the future.[638] Additionally, the children were members of an Indian tribe, and therefore the elements of the Indian Child Welfare Act (ICWA) also needed to be satisfied.[639] ICWA provides that in order for parental rights to be terminated, it must be shown by evidence beyond a reasonable doubt that the child would suffer "serious emotional or physical damage" if he or she remained in the custody of the parent whose rights are to be terminated.[640] Additionally, ICWA further requires that efforts must be made to keep the family together, and that those efforts must not have been successful.[641]

Rule 52(a) of the North Dakota Rules of Civil Procedure was amended to provide that the findings of fact in a juvenile court proceeding will not be overturned unless they are clearly erroneous.[642] However, it is within the court's authority to determine when a rule is in effect if it does not affect a substantive right.[643] The court noted that John did not appeal to the district court because he believed the North Dakota Supreme Court would review his case de novo.[644] The court concluded that in the interest of fairness and justice, it would apply the pre-amendment standard of review, akin to de novo review.[645]

In reviewing the record, the court first looked to whether the children were deprived.[646] The court reasoned that at the time of the termination

635. *Id.* ¶ 5, 681 N.W.2d at 788-89.
636. *Id.* ¶ 6, 681 N.W.2d at 789.
637. *Id.*
638. *Id.* ¶ 7 (citing N.D. CENT. CODE § 27-20-44(1)(b) (Supp. 2003)).
639. *Id.* (citing 25 U.S.C. § 1912(f) (2000)).
640. *Id.*
641. *Id.* (citing 25 U.S.C. § 1912(d)).
642. *Id.* ¶ 8.
643. *Id.*
644. *Id.* ¶ 9.
645. *Id.* at 790.
646. *Id.* ¶ 10.

hearing, Ted and Tina's parents were unable to provide for their care.[647] The mother had no contact with the children, and John voluntarily violated his probation, ultimately leading to his re-incarceration.[648]

Regarding continued deprivation, the court looked to the testimony of a practicing psychologist who testified that the continued absence of Ted's parents would lead to serious emotional harm.[649] Additionally, a social worker testified that Tina had been placed in at least five different homes in just four-and-a-half years.[650] The court also took into account the fact that John himself contributed to the instability of his children's lives by violating his probation and not providing a stable, safe home environment for the children.[651]

When considering the additional requirements as set forth in the Indian Child Welfare Act, the court looked to John's past conduct and his potential inability to refrain from such conduct in the future.[652] Additionally, the court looked to the assistance that was provided by Traill County Social Services to help keep John with his children.[653] The court noted that while John tried to comply with the requirements, he continued to use drugs and alcohol, which led to his incarceration and inability to care for his children.[654]

After reviewing the record, the North Dakota Supreme Court affirmed the juvenile court's order and held that there was clear and convincing evidence that the children were deprived, that the deprivation was likely to continue, and because of this continued deprivation the children were likely to suffer serious harm if John's parental rights were not terminated.[655] Additionally, the court also held that there was evidence beyond a reasonable doubt that if the children stayed in John's care, they would likely suffer serious emotional or physical harm.[656]

Justice Sandstrom and Justice Neumann concurred, with Justice Sandstrom concurring specially.[657] Justice Sandstrom agreed with the majority that John's parental rights should be terminated, but disagreed with the application of pre-amendment North Dakota Rule of Civil Procedure

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647. *Id.* ¶ 11.
648. *Id.*
649. *Id.* ¶ 13, 681 N.W.2d at 791.
650. *Id.* ¶ 14.
651. *Id.* ¶ 16.
652. *Id.* ¶ 22, 681 N.W.2d at 792.
653. *Id.*
654. *Id.*
655. *Id.* ¶ 24, 681 N.W.2d at 793.
656. *Id.*
657. *Id.* ¶ 25 (Sandstrom, J., concurring).

52(a).[658] Justice Sandstrom reasoned that because the application of the clearly erroneous standard in the amended version would not have worked an injustice, it should have been applied in its amended form.[659]

HEALTH LAW—GOVERNMENT ASSISTANCE—RECOVERY BACK OR RECOUPMENT OF PAYMENTS

IN RE ESTATE OF BERGMAN

The North Dakota Department of Human Services (the Department) appealed the dismissal of its claim against Lucille Bergman's estate for Medicaid benefits provided to her late husband, Carl Bergman.[660] The district court also dismissed the estate's action to void transfers made by Lucille to two of her sons shortly before her death.[661] The North Dakota Supreme Court reversed the district court's judgment, dismissed the Department's claims, and remanded the case because the trial court incorrectly applied Medicaid law and prior court precedent.[662]

In 1993, "Carl Bergman purchased a $50,000 single payment annuity from Lutheran Brotherhood," and in 1995 transferred "$5,000 from the annuity to a joint money market account" for Carl and Lucille Bergman.[663] In 1996, Carl moved to a nursing home and applied for Medicaid benefits.[664] To qualify under the impoverished spouse rules, Carl transferred all annuity and money market funds to Lucille, who used them to open a money market account in her own name.[665] In 1998, Lucille transferred $40,000 to an investment account and left about $13,790.24 in her money market account.[666]

In 2002, Lucille Bergman was diagnosed with cancer.[667] At that time, her attorney informed her that her estate might be responsible for Carl Bergman's Medicaid benefits.[668] In November 2002, Lucille withdrew $10,000 from her money market account for funeral expenses, redeemed the shares in her investment account, and transferred those funds to her money

658. *Id.*
659. *Id.*
660. *In re* Estate of Bergman, 2004 ND 196, ¶ 1, 688 N.W.2d 187, 188.
661. *Id.*
662. *Id.* ¶ 13, 688 N.W.2d at 192.
663. *Id.* ¶ 2, 688 N.W.2d at 188.
664. *Id.*
665. *Id.*
666. *Id.*
667. *Id.* ¶ 3.
668. *Id.*

market account.[669] On December 6, 2002, Lucille withdrew $34,000 from her money market account for deposit in her checking account.[670] She also executed a power of attorney granting Robert Bergman control over the funds.[671] On December 9, 2002, Lucille wrote a $30,000 check to Robert for gifts for her four children and "a $2,800 check to Doug Bergman for gifts to her four children and grandchildren."[672] On December 28, 2003, Lucille Bergman died.[673]

Lucille Bergman's estate wanted to void the transfers to Robert and Doug Bergman.[674] The Department was granted a motion to intervene in the estate's action against Robert and Doug Bergman to recover Carl Bergman's Medicaid costs.[675] The district court thereafter dismissed the estate's action and the Department's claim against the estate.[676]

The district court determined that there was no property in Lucille Bergman's estate, holding that Carl Bergman had transferred the annuity to Lucille Bergman long before his death and had no interest in the annuity at the time of his death.[677] In addition, the district court dismissed the Department's claim against Lucille's estate.[678] Relying on *In re Estate of Wirtz*,[679] the district court held that the annuity funds were Lucille Bergman's separate property, and she could freely decide how to allocate those funds.[680] Based on both the North Dakota definition of the estate subject to probate and the legal transfer permitted by federal law, the district court found that the funds were not fraudulently transferred and therefore were not available to reimburse the Department for the Medicaid claim.[681]

However, in its appeal to the North Dakota Supreme Court, the Department argued that the district court erred in its application of North Dakota and federal Medicaid law.[682] The Department asserted that

669. *Id.* at 188-89.
670. *Id.* at 189.
671. *Id.*
672. *Id.*
673. *Id.*
674. *Id.* ¶ 4.
675. *Id.*
676. *Id.*
677. *Id.*
678. *Id.*
679. 2000 ND 59, 607 N.W.2d 882. The court in *Wirtz* interpreted state and federal Medicaid statutes to limit the state's ability to recover benefits from the surviving spouse's estate. *Wirtz*, ¶ 7, 607 N.W.2d at 884.
680. *Bergman*, ¶ 4, 688 N.W.2d at 190.
681. *Id.*
682. *Id.* ¶ 5.

Lucille's assets were traceable to Carl, and that the transfer of those assets represented fraud.[683] The Department maintained that *In re Estate of Thompson*[684] and *Wirtz* allowed it to trace the assets of Medicaid recipients.[685]

In *Thompson*, the court determined that federal and state Medicaid statutes allowed the state to trace assets of a Medicaid recipient and to recover those Medicaid benefits after the death of the recipient's surviving spouse.[686] In addition, the Department may seek to recover Medicaid benefits from the estate of the recipient after the death of the recipient's spouse or directly from the recipient spouse's estate.[687]

In *Wirtz*, the court again construed the state and federal Medicaid statutes to allow the state "to trace a recipient's assets and to recover money from the estate of a recipient's surviving spouse . . . ."[688] However, the court noted that the recoverable assets were limited to only those assets in which the decedent originally held an interest.[689] The court also pointed out that the federal Medicaid statute does not permit recovery from the separately owned assets in the surviving spouse's estate.[690]

Before her death, Lucille was aware of a possible claim by the Department, and she transferred the assets in this dispute to her children.[691] The court concluded that North Dakota probate statutes permit the decedent's creditors to recover assets transferred to avoid recovery.[692] Moreover, North Dakota's Medicaid law permits recovery from the medical assistance recipient's estate.[693] The court also noted that the transfer of assets without the receipt of reasonably equivalent value in exchange is constructive fraud.[694]

The court rejected the lower court's determination that assets transferred from Carl Bergman to Lucille Bergman were her separate property.[695] The court concluded that such a transfer would frustrate the

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683. *Id.*

684. 1998 ND 226, 586 N.W.2d 847.

685. *Bergman*, ¶ 5, 688 N.W.2d at 190.

686. *See id.* ¶ 6 (noting that N.D. CENT. CODE § 50-24.1-07 (1999); and 42 U.S.C. § 1396p(b) (2000); permit recovery of Medicaid benefits).

687. *Id.*

688. *Id.* ¶ 7 (citing *In re* Estate of Wirtz, 2000 ND 59, ¶ 14, 607 N.W.2d 882, 886).

689. *Id.*

690. *Id.* (citing 42 U.S.C. § 1396p(b)).

691. *Id.* ¶ 10.

692. *Id.* ¶ 11.

693. *Id.* (citing N.D. CENT. CODE § 50-24.1-07).

694. *Id.* (citing N.D. CENT. CODE § 13-02.1-05(1) (2004)).

695. *Id.* at 191.

purpose of the Medicaid impoverished spouse provision.[696] The court explained that if the institutionalized spouse were allowed to transfer assets, the Department would be unable to recoup any of the Medicaid benefits provided to the institutionalized spouse.[697]

MEDICAL MALPRACTICE—WRONGFUL DEATH

LONG V. JASZCZAK

In *Long v. Jaszczak*,[698] David Long appealed the trial court's summary judgment dismissal of a wrongful death claim based on the death of his wife caused by complications of a medical procedure performed at Mercy Medical Center.[699] The North Dakota Supreme Court affirmed the dismissal of the claim against Dr. Jaszczak because it was barred by the statute of limitations and because the hospital did not owe Jane Long a legal duty of care.[700] However, the court reversed and remanded the claim against Dr. Adducci because he failed to obtain consent from Jane Long for the procedure.[701] The court concluded that the issues of materiality of risk and causation for failure to obtain consent were to be decided by the trier of fact.[702]

On July 6, 1999, Joseph E. Adducci treated Jane Long for a recurring urinary tract infection.[703] Dr. Adducci ordered an intravenous pyelogram (IVP) that was performed at Mercy Medical Center on July 9.[704] Dr. Jaszczak was the supervising radiologist.[705] Jane Long had an allergic reaction to the IVP, went into anaphylactic shock, and died on July 24, 1999, while in a coma.[706] Jane's husband, David Long, sued Dr. Adducci, Dr. Jaszczak, and Mercy Medical Center for failing to obtain informed consent from Jane for the IVP.[707] David argued that Mercy Medical Center's informed consent policy was either negligent or negligently administered in Jane's case.[708] The district court dismissed all claims

696. *Id.*
697. *Id.* ¶ 12, 688 N.W.2d at 192.
698. 2004 ND 194, 688 N.W.2d 173.
699. *Long*, ¶ 1, 688 N.W.2d at 175.
700. *Id.*
701. *Id.*
702. *Id.*
703. *Id.* ¶ 2.
704. *Id.*
705. *Id.*
706. *Id.*
707. *Id.* ¶ 3.
708. *Id.*

because David Long failed to timely disclose an expert to testify as to hospital administrative procedures and because he failed to establish a causal link between the failure to disclose risks and Jane's death.[709]

The North Dakota Supreme Court dismissed the claim against Dr. Jaszczak because the statute of limitations had run.[710] Under North Dakota Century Code section 28-01-18(3), recovery for damages resulting from medical malpractice is banned after two years.[711] When death results, the limitation period begins to run when "the plaintiff knows, or with reasonable diligence should know, of (1) the injury, (2) its cause, and (3) the defendant's possible negligence."[712] The court held that David Long had facts sufficient to place a reasonable person on notice of a potential malpractice claim when Jane Long fell into anaphylactic shock.[713] Thus, by the time David Long served his complaint on Dr. Jaszczak, the two-year period had run.[714] However, the statute of limitations issue was not sufficient to dismiss the case against Dr. Adducci because David Long was able to serve Dr. Adducci within the two-year time limit.[715]

The court then addressed the issue of whether Dr. Adducci was required to give informed consent to Jane Long before administering the IVP.[716] Informed consent is a disclosure given by the doctor in which a patient receives sufficient information "to make an informed and intelligent decision on whether to submit to a proposed course of treatment or surgical procedure."[717] Dr. Adducci argued that David Long failed to establish that

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709. *Id.* ¶ 4.

710. *Id.* ¶ 10, 688 N.W.2d at 176.

711. *Id.* ¶ 9.

712. *Id.* (citing Schanilec v. Grand Forks Clinic, Ltd., 1999 ND 165, ¶ 12, 599 N.W.2d 253, 255-56).

713. *Id.* ¶ 10.

714. *Id.* at 176-77. The date Jane Long went into shock was July 9, 1999, and thus the statute of limitations began to run on July 10, 1999. *Id.* at 176. The sheriff's return, which certified that the summons and complaint were delivered to the sheriff, was dated July 13, 2001, just outside the two-year period. *Id.*

715. *Id.* ¶ 11, 688 N.W.2d at 177. The summons and complaint were delivered to the sheriff on July 9, 2001, and the court had previously held that delivery to the sheriff "with the intent to promptly serve the defendant" is enough to satisfy North Dakota Century Code section 28-01-18. *Id.* Therefore, David Long met the requirements to comply with the statute of limitations for the claim against Dr. Adducci. *Id.*

716. *Id.* ¶ 12.

717. *Id.* ¶ 15, 688 N.W.2d at 178. The court described this duty:

> It clearly is not necessary for every physician or health care provider who becomes involved with a patient to obtain informed consent for every medical procedure to which the patient submits. Rather, it is the responsibility of a physician to obtain informed consent for those procedures and treatments that the physician formally prescribes or performs.

Id. (quoting Koapke v. Herfendal, 2003 ND 64, ¶ 18, 660 N.W.2d 206, 212).

death was a material risk of the IVP procedure, and since the risk of death was so remote, knowledge of the risk would not affect a reasonable patient's decision whether to undergo the surgery.[718] To determine whether a risk is material, the court analyzes two factors: "(1) an examination of the existence and nature of the risk and the probability of its occurrence; and (2) a determination by the trier of fact of whether the risk is the type of harm which a reasonable patient would consider in deciding on medical treatment."[719] The court found that the evidence indisputably showed that only 1 in 40,000 to 1 in 150,000 patients receiving an IVP would later die from it.[720] The court then found that whether this was the type of risk a reasonable patient would consider to be material was something that the trier of fact must decide, but it also found that Dr. Adducci owed Jane Long a legal duty of informed consent.[721] The court also held that expert testimony was not necessary in this case because the type of harm in question, the risk and the likelihood of that risk occurring, were factors that were not in question.[722] Expert testimony is not necessary to establish what significance a reasonable person would attach to the risk of death.[723]

The court then affirmed the summary judgment dismissal against Mercy Medical Center.[724] To prevail on his claim, David Long would have had to show that Mercy Medical Center owed Jane Long a duty to obtain informed consent for the IVP.[725] The court cited *Kershaw v. Reichert*[726] as holding that it is the surgeon, not the hospital, that has the knowledge necessary to warn patients of the risk associated with a certain medical procedure, and that the "hospital does not know the patient's medical history nor the details of the particular surgery to be performed."[727] David Long argued that the hospital accepted the duty to inform by having a written policy for executing informed consents.[728] Since this was an issue that had never specifically been addressed in North Dakota, the court looked to what other jurisdictions have held.[729] Ultimately, the court agreed

718. *Id.* ¶ 16.

719. *Id.* ¶ 17 (citing Jaskoviak v. Gruver, 2002 ND 1, ¶ 18, 638 N.W.2d 1, 8).

720. *Id.* ¶ 18, 688 N.W.2d at 179.

721. *Id.* ¶ 21, 688 N.W.2d at 179-80.

722. *Id.* ¶ 23, 688 N.W.2d at 180.

723. *Id.* Expert testimony is generally used "to identify the risks of treatment, their gravity, likelihood of occurrence, and reasonable alternatives." *Id.*

724. *Id.* ¶ 29, 688 N.W.2d at 181.

725. *Id.* ¶ 26.

726. 445 N.W.2d 16 (N.D. 1989).

727. *Long*, ¶ 26, 688 N.W.2d at 181 (quoting Kershaw v. Reichert, 445 N.W.2d 16, 18 (N.D. 1989)).

728. *Id.* ¶ 27.

729. *Id.*

with the majority of other jurisdictions and held that a written hospital policy does not in and of itself create a legal duty upon the hospital to obtain a patient's informed consent for a particular procedure.[730]

TORTS—MUNICIPAL CORPORATIONS—NATURE AND GROUNDS OF LIABILITY

FICEK V. MORKEN

The City of Fargo appealed a jury verdict awarding the Ficeks $107,000 plus costs and disbursements in the Ficeks' action against the Morkens and the City.[731] The court rejected Fargo's plea to adopt the public duty doctrine because it was incompatible with North Dakota law.[732] The court concluded that "the district court did not err in instructing the jury that the City had a duty to properly inspect the construction of the Ficeks' residence and to enforce building codes."[733]

In 1988, the Morkens started construction of an addition to their home.[734] The City of Fargo "issued the Morkens a building permit."[735] During the two-year construction period, the City's building inspectors conducted more than forty inspections to ensure building code compliance.[736] In 1990, the City issued a certificate of occupancy to the Morkens, certifying that the building met the applicable building codes.[737]

In 1996, the Ficeks purchased the house from the Morkens, and over time, "noticed problems with the home's construction."[738] Experts inspected the house and "determined [that the house] d[id] not comply with the City's building code in several respects."[739] Subsequently, a structural engineer advised the Ficeks that they needed to repair the foundation of the house or vacate it.[740]

The Ficeks then brought this action against the Morkens and the City, claiming that the City had "a duty to ensure that all buildings are constructed according to relevant building codes and to properly inspect buildings under construction to ensure the builder is following all relevant

730. *Id.* ¶¶ 28-29.
731. Ficek v. Morken, 2004 ND 158, ¶ 1, 685 N.W.2d 98, 99.
732. *Id.*
733. *Id.*
734. *Id.* ¶ 2.
735. *Id.*
736. *Id.*
737. *Id.*
738. *Id.* ¶ 3.
739. *Id.*
740. *Id.*

building codes."[741] The Ficeks claimed that the City "breached its duty by negligently inspecting and approving the construction of the foundation of the subject residence, as said foundation does not meet the required building code."[742] At trial, the City requested an instruction based on the public duty doctrine, but the district court did not give this instruction, and instead gave a different instruction requested by the Ficeks.[743] This instruction stated that the City of Fargo owed a duty to the Ficeks to properly inspect the construction and to enforce the building codes.[744]

The only issue on appeal was whether the jury's instruction constituted reversible error.[745] The court stated that jury instructions must fairly advise the jury of the law on the essential issues in the case.[746] The City argued that the public duty doctrine controlled, and therefore, it owed no duty to the Ficeks.[747] The court answered this claim, stating that it had never adopted or even addressed the public duty doctrine.[748]

The court pointed out that even though a majority of jurisdictions adhere to some form of the public duty doctrine, there is a trend towards abolishing the rule.[749] Thus, the court refused to adopt the public duty doctrine.[750] The court reasoned that a state statute provided that political subdivisions are liable for damages caused by an employee's negligence if that employee would be personally liable for the damage.[751] Because of this statute, the court concluded that "the public duty doctrine [was] incompatible with North Dakota law."[752]

Chief Justice VandeWalle concurred specially in the court's decision.[753] The Chief Justice agreed with the majority opinion because the public duty doctrine was contrary to the wording of North Dakota Century Code section 32-12.1-03.[754] Specifically, the Chief Justice agreed with the

741. *Id.* ¶ 4.
742. *Id.*
743. *Id.* ¶ 5, 685 N.W.2d at 100.
744. *Id.*
745. *Id.* ¶ 7.
746. *Id.* ¶ 8.
747. *Id.* ¶ 10, 685 N.W.2d at 101.
748. *Id.* ¶ 11. The public duty doctrine provides that if a statute imposes a duty upon a public entity to the public at large and not to a particular class of individuals, the duty is not enforceable in tort. *Id.*
749. *Id.* ¶ 20, 685 N.W.2d at 104 (citing Jean W. v. Commonwealth, 610 N.E.2d 305, 312 (Mass. 1993) (Liacos, C.J., concurring)).
750. *Id.* ¶ 28, 685 N.W.2d at 107.
751. *Id.* (citing N.D. CENT. CODE § 32-12.1-03(1) (Supp. 2003)).
752. *Id.* ¶ 31, 685 N.W.2d at 108.
753. *Id.* ¶ 34 (VandeWalle, C.J., concurring).
754. *Id.*

understanding that certification of a building's compliance with codes is not a guarantee that there are no defects in the building, or if there are defects, it does not mean that the governmental entity issuing the certification is automatically liable.[755]

TORTS—NEGLIGENCE—EXISTENCE OF DUTY—DUTY AS A QUESTION OF FACT OR LAW

AZURE V. BELCOURT PUBLIC SCHOOL DISTRICT

Agnes and Pete Azure appealed a summary judgment dismissal of their negligence action against the Belcourt Public School District.[756] The Azures' action was based on injuries Agnes Azure received while working at the Turtle Mountain Community School.[757] The North Dakota Supreme Court affirmed the summary judgment ruling, holding that the Azures failed to raise a genuine issue of material fact.[758]

Agnes was employed as a special education teacher at the Turtle Mountain Community Middle School.[759] At the time of her injury, she was on duty as a lunchroom supervisor in the Middle School's cafeteria.[760] When a fight broke out between two students, Agnes intervened, but ended up suffering a traumatic brain injury and was unable to return to work.[761]

The school building in which the lunchroom is located is owned by the United States Bureau of Indian Affairs (BIA), and is operated jointly by the local school district and the BIA.[762] Middle School teachers were accountable to the Middle School principal regardless of whether the teachers were BIA or School District employees.[763] Agnes sued the School District, complaining that it negligently failed to maintain a safe environment at the Middle School and that she was injured as a result of that negligence.[764] Pete sued for loss of consortium.[765]

The court explained that to establish actionable negligence, "the plaintiff must show the defendant had a duty to protect the plaintiff from

755. *Id.*
756. Azure v. Belcourt Pub. Sch. Dist., 2004 ND 128, ¶ 1, 681 N.W.2d 816, 817.
757. *Id.*
758. *Id.*
759. *Id.* ¶ 2, 681 N.W.2d at 818.
760. *Id.*
761. *Id.*
762. *Id.*
763. *Id.* ¶ 4.
764. *Id.*
765. *Id.*

injury."[766] The existence of a duty is a preliminary question to be decided by the court.[767] If there is no duty, there is no negligence.[768] If reasonable persons could reach only one conclusion, an issue of fact becomes an issue of law for the court to decide, not the trier of fact.[769]

The court further stated that "the Azures. . . [needed to] first establish that the school district had a duty to protect Agnes Azure."[770] Specifically, the Azures had to show that the School District had a legal duty to provide a safe environment for Agnes in the lunchroom.[771] The court stated that "[w]hether the relation between two parties is such that it gives rise to a duty is a question of law for the court to decide."[772]

The court reasoned that to establish that the school district had a duty to protect Agnes in the lunchroom, it was essential "to establish a relationship through supervisory and operational controls."[773] If the supervisory or operational control of the lunchroom could not be established, there would be no relationship between the parties giving rise to a duty, and therefore no liability for negligence.[774] The court found that there was "no evidence presented that establish[ed] that the School District's control over Middle School operations included control over the lunchroom, lunchroom supervision plan, or BIA employee Agnes Azure."[775] The court concluded that the record was void of any facts supporting an inference that the "School District had a responsibility to provide, manage, or participate in the operational control of the lunchroom or the lunchroom supervisory plan when Agnes Azure was injured."[776] The court further concluded that "the Azures failed to raise a genuine issue of material fact that would preclude summary judgment," and affirmed "the district court's grant of summary judgment."[777]

766. *Id.* ¶ 9, 681 N.W.2d at 819.
767. *Id.*
768. *Id.* at 820.
769. *Id.*
770. *Id.* ¶ 10.
771. *Id.*
772. *Id.*
773. *Id.* ¶ 11.
774. *Id.*
775. *Id.* ¶ 13, 681 N.W.2d at 821.
776. *Id.* ¶ 16, 681 N.W.2d at 822.
777. *Id.*

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